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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case No. 18-23538-rdd

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In the Matter of:

SEARS HOLDINGS CORPORATION, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court  
300 Quarropas Street, Room 248  
White Plains, New York 10601

August 2, 2019  
10:08 AM

B E F O R E:  
HON. ROBERT D. DRAIN  
U.S. BANKRUPTCY JUDGE

1 18-23538-rdd Sears Holdings Corporation, et al.

2 Ch 11

3

4 HEARING re Statement/Notice of Assumption and Assignment of  
5 Additional Designatable Leases [ECF No. 3298]

6

7 HEARING re Objection to Cure Amount for Store #1008 Filed by  
8 Izek Shomof and Aline Shomof Irrevocable Children's Trust  
9 Dated February 11, 1999, Vegas Group, LLC, and East River  
10 Group, LLC [ECF No. 1837]

11

12 HEARING re Supplemental Cure Objection and Reservation of  
13 Rights (Store #1008) Filed by Izek Shomof and Aline Shomof  
14 Irrevocable Children's Trust Dated February 11, 1999, Vegas  
15 Group, LLC, and East River Group, LLC [ECF No. 3477]

16

17 HEARING re Declaration of Izek Shomof in Support of  
18 Supplemental Cure Objection and Reservation of Rights (Store  
19 #1008) Filed by Izek Shomof and Aline Shomof Irrevocable  
20 Children's Trust Dated February 11, 1999, Vegas Group, LLC,  
21 and East River Group, LLC [ECF No. 3478]

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1 HEARING re So Ordered Stipulation and Order By and Among  
2 Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof  
3 Irrevocable Children's Trust Dated February 11, 1999, Vegas  
4 Group, LLC, and East River Group, LLC (I) Extending Time  
5 Under 11 U.S.C. § 365(d)(4) for Assumption or Rejection of  
6 Lease of Nonresidential Real Property [ECF No. 3817]

7  
8 HEARING re So Ordered Stipulation and Order By and Among  
9 Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof  
10 Irrevocable Children's Trust Dated February 11, 1999, Vegas  
11 Group, LLC and East River Group, LLC (I) Extending Time for  
12 Assumption or Rejection of Lease of Nonresidential Real  
13 Property and Setting Briefing Schedule [ECF No. 4186]

14  
15 HEARING re Transform Holdco LLC's Reply in Support of  
16 Assumption and Assignment of Designated Lease for Store  
17 Located at 2650 East Olympic Boulevard, Los Angeles,  
18 California [ECF No. 4489]

19  
20 HEARING re Landlord's Reply to Transform Holdco LLC's Reply  
21 in Support of Assumption and Assignment of Designated Lease  
22 for Store Located at 2650 East Olympic Boulevard, Los  
23 Angeles, California" [ECF No. 4624]

1 HEARING re Declaration of Izek Shomof in Support of  
2 Landlord's Reply to Transform Holdco LLC's Reply in Support  
3 of Assumption and Assignment of Designated Lease for Store  
4 Located at 2650 East Olympic Boulevard, Los Angeles,  
5 California [ECF No. 4625]

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25 Transcribed by: Lisa Beck, Jamie Gallagher and Pamela Skaw

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22 BY: ANDREW WEAVER, ESQ.

23 KATE MASSEY, ESQ.

24

25

1 P R O C E E D I N G S

2 THE COURT: All right. Good morning. In re Sears  
3 Holdings Corp.

4 MR. WEAVER: Good morning, Your Honor. Andrew  
5 Weaver, Cleary Gottlieb, on behalf of Transform.

6 THE COURT: Good morning.

7 MR. WEAVER: This morning we have a lease  
8 assumption cure objection matter before Your Honor. The  
9 landlord does have a declarant who will be crossed in the  
10 courtroom. And then the parties will have argument.

11 There is a little evidentiary issue with some of  
12 the exhibits. We're happy to address now, Your Honor, or  
13 after the cross of the witness, whatever your preference.

14 THE COURT: Well, I have two binders, one of which  
15 is the parties' joint exhibits.

16 MR. WEAVER: Correct, Your Honor.

17 THE COURT: So the admissibility of those is  
18 agreed?

19 MR. WEAVER: Correct, Your Honor.

20 THE COURT: Okay.

21 (Joint Exhibits received in evidence)

22 MR. WEAVER: And then I have a binder labeled  
23 "Landlord's Exhibit List". I don't know whether all of  
24 these are objected to or just some of them?

25 MR. WEAVER: They are. They're buckets, Your

1 Honor, which I can quickly summarize for you.

2 THE COURT: Okay.

3 MR. WEAVER: So, Your Honor, looking at Landlord's  
4 Exhibits -- 1, in particular, is a summary document. And  
5 presumably, it's being submitted under Rule 1006. Just by a  
6 quick glance at the document, there are some errors in the  
7 document based upon the evidence that the party -- landlord  
8 had submitted. And so, we just don't think the document is  
9 necessarily reliable.

10 The second bucket, Your Honor, relates to --

11 THE COURT: Well, on that point --

12 MR. WEAVER: Yeah.

13 THE COURT: -- if you correct the errors, is it  
14 then reliable --

15 MR. WEAVER: Well --

16 THE COURT: -- or you just haven't had the chance  
17 to do the due diligence and therefore it's --

18 MR. WEAVER: You know, we got this on Friday, Your  
19 Honor, so it's been a week. But -- so we really haven't  
20 done a thorough due diligence. Look, obviously, Your Honor  
21 can -- capable of looking at the evidence. We appreciate  
22 that and can disregard what you deem to be not liable. But  
23 we just found not having really -- it tied out to anything  
24 in particular, we found to be a little bit problematic.

25 THE COURT: Okay.

1 MR. WEAVER: That relates, Your Honor, to the  
2 second bucket which is Landlord Exhibit 2, 3 and 4. These  
3 are invoices and checks which presumably are the backup for  
4 number 1. And these documents, Your Honor, were provided  
5 for the first time on Friday as part of the surreply and  
6 attached to the declaration. We served discovery in May in  
7 this case. We deposed their declarant in June in this case.  
8 And we just now, a week ago, received the materials.

9 Again, as a general matter, we find this to be  
10 parol evidence that you don't need to get to because the  
11 contracts, we think, are clear, Your Honor. But we just  
12 believe that, as a procedural matter, that's improper when  
13 they were clearly called for in discovery. We had a  
14 deposition and then we get these documents at the eleventh  
15 hour.

16 THE COURT: Okay.

17 MR. WEAVER: The next bucket, Your Honor, is  
18 Landlord Exhibit 5, 6, 7, 8, 9 and 10. These are e-mails,  
19 Your Honor, that, if you look at them all, they are all  
20 e-mails that were forwarded by the landlord to his counsel  
21 that has a commentary at the beginning of each -- of the  
22 forward chains. But the timing is also the issue, Your  
23 Honor. The deposition took place on June 24th in L.A. All  
24 of these e-mail chains were sent either during the  
25 deposition or after the deposition to counsel. So we did



1 receive them. They were produced a couple days later to us.  
2 But the point of the deposition, Your Honor, was to ask  
3 questions about the evidence they're relying upon. And a  
4 significant portion of the evidence they want to rely upon  
5 now are documents that they found during and after the  
6 deposition and forwarded it along. So we think, again,  
7 procedurally, Your Honor, that is improper beyond the parol  
8 evidence issue. And the mere fact that there is commentary  
9 at the start of many of these chains, Your Honor, would not  
10 make these appropriate exhibits for evidence in this matter.

11 THE COURT: Well, I can always disregard the  
12 commentary.

13 MR. WEAVER: Absolutely, Your Honor. Your choice.

14 THE COURT: Okay.

15 MR. WEAVER: And then the next bucket, Your Honor,  
16 is Exhibits -- Landlord's Exhibits 11, 12, 13, 14 and 15 --  
17 I'm sorry -- through 14. These are photographs that, again,  
18 we were just given on Friday. The only backup for these  
19 photographs is that the declarant said they were taken at  
20 his direction. Again, these would be clearly responsive to  
21 discovery. We didn't get a chance to depose the witness on  
22 this information. Again, I don't think it's probative at  
23 all in any way, Your Honor, but, again, this seems  
24 procedurally improper.

25 THE COURT: Okay.

1 MR. WEAVER: And I believe Landlord Exhibit 15 is  
2 another summary document. This relates to certain wire  
3 transfers. I don't think the wire transfers are in dispute  
4 here, Your Honor. We just don't know where this document  
5 really is sourced from. Frankly, if this were admitted, we  
6 don't think we would have a serious concern but, again, it's  
7 just from a procedural standpoint.

8 And then finally, Exhibit 16 is also a summary  
9 document. This was attached earlier to a supplemental cure  
10 objection in May. There was no backup. Presumably this  
11 ties to Exhibit 1 as well and presumably ties to the  
12 invoices we've just received. But again, I'm just not sure  
13 without much more sourcing than that that it's reliable  
14 under the rules, Your Honor.

15 THE COURT: Okay. All right. Was there an  
16 agreement on discovery just to when it would be provided?  
17 When was the discovery request made?

18 MR. WEAVER: Your Honor, the discovery request was  
19 made on May 17th. And there was an agreement to produce on  
20 June 17th, a week before the deposition. I can read you the  
21 discovery request, Your Honor, but they are as you would  
22 imagine, the documents they relied upon to support their  
23 cure claim.

24 THE COURT: Okay.

25 MR. KUPETZ: Good morning, Your Honor. David

1 Kupetz with SulmeyerKupetz, appearing on behalf of landlord  
2 which is the Shomof trust, Vegas Group and East River Group.

3 THE COURT: Good morning.

4 MR. KUPETZ: Your Honor, with respect to these  
5 evidentiary objections, I'd like to first, if the Court will  
6 allow, address Landlord's Exhibits 5 through 10 because that  
7 has some carryover with respects to some of the other  
8 issues.

9 Those requests were not covered in any way by  
10 Transform's discovery documents and -- request document  
11 which I have if the Court would like to look at it. I have  
12 copies of Transform's discovery requests. It became only  
13 apparent during Mr. Shomof's deposition on June 24th. And,  
14 of course, Mr. Shomof is present in the courtroom, Your  
15 Honor, because he's the declarant and can be cross-examined.

16 It became only apparent for the first time that  
17 these e-mails were relevant to show, of course, the  
18 performance. Certainly, that was never an issue raised by  
19 Sears. The landlord had been working with Sears. Part of  
20 the argument here is --

21 THE COURT: Can I see the discovery request?

22 MR. KUPETZ: Yes, Your Honor. May I approach?

23 THE COURT: Sure.

24 (Pause)

25 THE COURT: Okay. You can go ahead.

1 MR. KUPETZ: So these e-mails were produced in  
2 real time, a good portion of them, actually during the  
3 deposition because during the deposition for the first time  
4 it became apparent to myself and to the landlord that  
5 Transform was taking a position different from Sears that  
6 this April 1st, 2017 completion deadline was the real  
7 deadline date that hadn't been modified by the course of  
8 performance by the parties. And therefore, we had these  
9 messages forwarded immediately. And we handed what we could  
10 during the deposition. Given the timing -- I think the  
11 deposition ended at 3:15 p.m. or something like that. A  
12 number of these messages were located very quickly by my  
13 client's representatives who weren't at the deposition.  
14 There were several that were at the deposition besides Mr.  
15 Shomof. And there were then subsequent messages that were  
16 discovered in the next couple of days were then uploaded to  
17 ShareFile. And they were used in the declaration as  
18 exhibits in the same form as they were produced to  
19 Transform. And the Court can disregard the forwarding  
20 message. I'd ask the Court to disregard that forwarding  
21 message. There's no real substance there. We're not  
22 intending -- it's not like a jury or something where there's  
23 going to be some influence.

24 Also, the parol evidence rule does not apply as  
25 set forth in the reply, which is ECF number 4624 at page 5.

1 Under California law, which the parties concede is the  
2 governing law here, "Course of performance can supplement,  
3 qualify or modify contrary terms in a contract." And as the  
4 district court said in the Facebook case, and that's cited  
5 at page 5 of the reply: "California case law recognizes  
6 that course of performance evidence is allowed to explain or  
7 supplement integrated contracts" --

8 THE COURT: Right. Not modify.

9 MR. KUPETZ: No. It does talk about modify as  
10 well. But it explains supplement or modified. The quote  
11 there, though, is "explain or supplement integrated  
12 contracts" --

13 THE COURT: Right. Exactly.

14 MR. KUPETZ: -- "even when the contract" --

15 THE COURT: Listen, I will hear from the other  
16 side where their course of performance issue as far as the  
17 rights to the money and the deposit was raised at any time  
18 before the June cut off --

19 MR. KUPETZ: Understood.

20 THE COURT: -- date.

21 MR. KUPETZ: Understood, Your Honor. Just in  
22 terms of procedurally, how this worked, as the Court, I  
23 think, is aware, all that -- when the landlord filed its  
24 original cure objection and the supplemental cure objection,  
25 all we saw was the amount set forth --

1 THE COURT: Which was zero.

2 MR. KUPETZ: -- for the cure was zero.

3 THE COURT: I understand. But I don't know if  
4 there were discussions about -- or if people just went right  
5 to discovery. So were there discussions about the escrow --  
6 the deposit? It's actually not held in escrow, right? Is  
7 there an escrow agent?

8 MR. KUPETZ: There is not, Your Honor.

9 THE COURT: So it's just a deposit.

10 MR. KUPETZ: The agreement --

11 MR. WEAVER: A deposit, Your Honor.

12 MR. KUPETZ: -- contemplated an escrow agent but  
13 then the parties between themselves agreed never to use an  
14 escrow agent.

15 THE COURT: All right.

16 MR. KUPETZ: So the --

17 THE COURT: So was there a discussion about the --  
18 what happened to the escrow -- the timing issue, et cetera,  
19 before the June 17 cutoff date?

20 MR. WEAVER: Your Honor, there was not really  
21 substantive discussions amongst the parties --

22 THE COURT: Right.

23 MR. WEAVER: -- as to the legal matters. No,  
24 there weren't.

25 THE COURT: So I'll admit those documents over the

1 objection that they were produced late. As far as their use  
2 and their admissibility, I'll wait to hear the rest of the  
3 evidence --

4 MR. KUPETZ: Okay. Thank you, Your Honor.

5 THE COURT: -- as far as how they might be used if  
6 at all.

7 MR. KUPETZ: Understood, Your Honor.

8 THE COURT: Okay.

9 MR. KUPETZ: With respect to Landlord's Exhibit 1,  
10 it's really presented as an illustrative summary. It's  
11 referenced in paragraph 16 of the Shomof declaration, ECF  
12 number 4625. The invoices and checks are referenced in  
13 paragraphs 30 and 31 of the declaration.

14 THE COURT: All right. But if it doesn't foot,  
15 it's really not helpful. It's actually not -- to the  
16 opposite. It's potentially prejudicial. So you tell me  
17 that the underlying documents are in evidence. We'll just  
18 rely on those.

19 MR. KUPETZ: And with respect to Exhibits 2, 3 and  
20 4, those are copies of the underlying documents that are  
21 referenced in Exhibit 1 and are also referenced in paragraph  
22 16 of the Shomof declaration, ECF 4625.

23 THE COURT: Right. But I think this was a post-  
24 discovery cutoff date objection, too. So were other  
25 invoices produced and not these?

1 MR. KUPETZ: I think the other invoices were  
2 produced. It was not any intent to omit any. There may  
3 have been a couple that weren't produced previously. It  
4 wasn't by -- it certainly wasn't by design.

5 THE COURT: Okay. Well, I've not reviewed these  
6 three exhibits. If they are not admitted -- I mean, they're  
7 part of the cure claim, right? They serve a base for the  
8 cure claim? What is the --

9 MR. KUPETZ: There are some underlying --

10 THE COURT: What are the invoices for?

11 MR. KUPETZ: They're underlying backup material  
12 that shows -- may not be necessary but underlying backup  
13 material that shows the work that was done and then billed  
14 to the landlord for which the landlord seeks reimbursement  
15 from --

16 THE COURT: But work done in connection with what?

17 MR. WEAVER: Your Honor, I think to that  
18 question's very clear. This is for work that was done,  
19 invoiced and paid by the tenant. That's what the  
20 declaration says. And if you want, Your Honor, we can cross  
21 on this and you can decide whether or not they're  
22 admissible.

23 THE COURT: I'll decide when I hear --

24 MR. WEAVER: Okay. It's based --

25 MR. KUPETZ: Your Honor, just --



1 THE COURT: No. I'm not going to rule on this  
2 now. I'll decide when we have the examination.

3 MR. WEAVER: Thank you, Your Honor.

4 MR. KUPETZ: I think the only additional ones --

5 THE COURT: Photographs --

6 MR. KUPETZ: Yeah.

7 THE COURT: -- and the two charts.

8 MR. KUPETZ: Right. So the photographs are really  
9 just -- they're illustrative of the testimony that appears  
10 in paragraphs 33 and 34 of the declaration. And just shows  
11 the Court exactly what the declarant is speaking of there.  
12 He had these photographs taken under his direction.

13 THE COURT: I don't think I need them. I think  
14 they're irrelevant.

15 MR. KUPETZ: Okay.

16 THE COURT: So I'll exclude those.

17 MR. KUPETZ: And then with respect -- I think the  
18 remaining ones, Your Honor, Exhibit 15, I believe --

19 THE COURT: Right. To the extent it's relevant,  
20 I'll admit this.

21 MR. KUPETZ: I mean, I think I heard counsel they  
22 didn't really have an objection but I may have misheard.

23 THE COURT: Yeah. Well --

24 MR. WEAVER: There's no debate, I think, Your  
25 Honor, that money came in, some money came out. I don't

1 think --

2 THE COURT: And there are no issues about  
3 inaccuracy on this one, right?

4 MR. WEAVER: Correct.

5 THE COURT: All right.

6 MR. WEAVER: Yeah. I just don't know the source  
7 of it, et cetera. I just think to the extent the parties  
8 are not debating the fact that money came in and some money  
9 came out, I don't think it's necessarily --

10 THE COURT: Well, this has a specific dollar  
11 figure attached to it, right?

12 MR. WEAVER: Correct, Your Honor. I don't think  
13 the dollar amount is in dispute. I think --

14 THE COURT: It's not. Okay.

15 MR. WEAVER: For what was deposited and what has  
16 been paid to the landlord by the tenant, there's no debate  
17 about that, Your Honor.

18 THE COURT: All right. So that's fine. So this  
19 is admitted now.

20 MR. KUPETZ: And, Your Honor, the final one is  
21 Exhibit 16 which is a document that came from the  
22 supplemental cure objection which is ECF 3477. And what it  
23 does is it just provides a detail breakdown of the  
24 supplemental cure amount of 5,696,000 which is set forth as  
25 well in the declaration in less detail. This provides a

1 breakdown of the various categories.

2 THE COURT: But I don't have the actual invoices  
3 or checks or anything like that.

4 MR. KUPETZ: I'm not sure. I think that's right  
5 but I have to --

6 THE COURT: So I can't admit a summary of  
7 something that's not in the record. So that one's out.

8 So just to summarize then, Exhibit 1 in this  
9 landlord exhibit list is not admitted. The Exhibits 2  
10 through 4 I'll determine as far as how they'll be used, if  
11 at all, but otherwise would be admitted.

12 (Landlord's Exhibits 2 through 4 conditionally received  
13 in evidence)

14 THE COURT: The e-mails in 5 through 9 are  
15 admitted except for the commentary which I'll disregard.  
16 I'm sorry. 5 through 10. Excuse me.

17 (Landlord's Exhibits 5 through 10 received in evidence)

18 THE COURT: And then 11 through 14 are not  
19 admitted. 15 is admitted and 16 is not admitted.

20 (Landlord's Exhibit 15 received in evidence)

21 MR. KUPETZ: Thank you, Your Honor.

22 THE COURT: Okay.

23 MR. WEAVER: Thank you, Your Honor.

24 MR. KUPETZ: Your Honor, if the Court will allow,  
25 I'm prepared to present Mr. Shomof and -- again, if the

1 Court will allow, have his declarations admitted as his --  
2 or adopted as his direct testimony.

3 THE COURT: Okay. That's fine. And just to be  
4 clear, those are the May 1, 2019 declaration and the July  
5 26, 2019 declaration? Are those the two? They're in my  
6 binder. It's not an exhibit binder but it's the hearing  
7 binder. They're tabs --

8 MR. KUPETZ: Yes.

9 THE COURT: -- 2 and 6.

10 MR. KUPETZ: Definitely the July 26th.

11 THE COURT: I'm sorry. 3 and 6. Excuse me. Not  
12 2. 3 and 6.

13 MR. KUPETZ: Yeah. That's correct, Your Honor.

14 THE COURT: Okay. So do you want to cross-examine  
15 Mr. Shomof?

16 MR. WEAVER: I do, Your Honor.

17 THE COURT: All right. So can you take the stand?

18 (Pause)

19 THE COURT: Would you raise your right hand,  
20 please?

21 IZEK SHOMOF, WITNESS, SWORN

22 THE COURT: And would you please spell your name  
23 for the record?

24 THE WITNESS: Good morning, Your Honor. My name  
25 is Izek Shomof, I-Z-E-K, Shomof, S-H-O-M-O-F.

1 THE COURT: Okay. Now, Mr. Shomof, you submitted  
2 two declarations in support of what I'll refer to as the  
3 landlord's objection. It's the Izek Shomof/Aline Shomof  
4 Irrevocable Children's Trust, Vegas Group, LLC and East  
5 River Group, LLC but I'll refer to them as the landlord.

6 So you submitted two declarations in support of  
7 the cure objection to -- in connection with the motion to  
8 assume and assign the lease of the store in Los Angeles.

9 The first declaration is dated May 1, 2019 and the  
10 second is dated July 26, 2019. You recall both of those  
11 declarations?

12 THE WITNESS: I do.

13 THE COURT: Sitting here today knowing that they  
14 would constitute your direct testimony in this contested  
15 matter, do you still want that to be your direct testimony?

16 THE WITNESS: Yes.

17 THE COURT: And is there anything that you would  
18 change in them knowing that it would be your direct  
19 testimony?

20 THE WITNESS: Yes.

21 THE COURT: Okay. And what would that be?

22 THE WITNESS: What --

23 THE COURT: What would you change?

24 THE WITNESS: No. I do not need to change.

25 THE COURT: There's nothing that you would --

1 THE WITNESS: No change.

2 THE COURT: -- change --

3 THE WITNESS: No.

4 THE COURT: -- as your direct testimony.

5 THE WITNESS: So --

6 THE COURT: Okay. All right. So I will admit each  
7 of them as Mr. Shomof's direct testimony.

8 (Declaration of Izek Shomof dated May 1, 2019 received  
9 in evidence)

10 (Supplemental declaration of Izek Shomof dated July 26,  
11 2019 received in evidence)

12 MR. WEAVER: Your Honor, I have a cross binder for  
13 the witness and Your Honor, if I may approach?

14 THE COURT: Okay.

15 MR. WEAVER: Thank you, Your Honor.

16 THE COURT: Uh-huh.

17 CROSS-EXAMINATION

18 BY MR. WEAVER:

19 Q Good morning, Mr. Shomof.

20 A Good morning.

21 Q I want to start with the construction estimate deposit.  
22 And so this is tab 6 in your binder. This is the 2015  
23 amendment. And looking just in general on pages 3 and 4 and  
24 5, under this amendment, you agreed, Mr. Shomof, to perform  
25 work related to low voltage services, HVAC, plumbing,

1 façade, signage and freight elevators. Correct?

2 A Now let's go back for a second. You said page --

3 Q I'm sorry, Mr. Shomof. In tab 6, if you look -- you  
4 know, it's a little easier if we use the ECF pages. So at  
5 the top of the page, you'll see page 16 of 135. You see  
6 that?

7 A Page 16?

8 Q Of 135 at the top.

9 A Okay.

10 Q And you'll see that there's page 17 of 135 at the top  
11 and page 18 of 135 at the top. Do you see that?

12 MR. WEAVER: Your Honor, may I just --

13 THE COURT: So it's paragraphs 3 through --

14 MR. WEAVER: 3 through 10.

15 THE WITNESS: 16 of 135. Yeah, I do see it.

16 THE COURT: 3 through 10.

17 MR. WEAVER: Okay.

18 THE COURT: Okay.

19 BY MR. WEAVER:

20 Q So under this 2015 amendment, Mr. Shomof, you as a  
21 landlord agree to do work related to low voltage, HVAC,  
22 plumbing, façade, signage, seismic work and freight  
23 elevators. Correct?

24 A Correct.

25 Q And under this agreement, you as a landlord agreed to

1 complete this work by April 1st, 2017, correct?

2 A Yes.

3 Q And you did not complete all of that work by April 1st,  
4 2017, correct?

5 A We did not due to the agreement that we had with Sears  
6 that it should continue.

7 Q Mr. Shomof, my question is you did not complete the  
8 work by April 1st, 2017. Correct?

9 A Correct.

10 Q Now if you turn to paragraph 25, Mr. Shomof, and this  
11 is found on page 28 of 135, again, still in tab 6, and under  
12 this agreement, you as a landlord provided the tenant with a  
13 \$3.25 million construction estimate deposit. Correct?

14 A Yes.

15 Q And that was to "partially secure Landlord's design,  
16 repair, construction and completion obligations under [the]  
17 amendment". Correct?

18 A Correct.

19 Q Now if you turn the page to subparagraph (d), Mr.  
20 Shomof, also under this agreement, you agreed, under Section  
21 (d), "In the event Landlord does not complete the work  
22 contemplated in Sections 3, 4, 6 and 7" -- so that relates  
23 to low voltage, HVAC, façade and signage -- "by April 1,  
24 2017, the remainder of [the] funds in the Construction Fund  
25 Escrow shall be released to [the] Tenant, at Tenant's



1 election, so that [the] Tenant [may] cause...work to be  
2 completed and [that] Tenant [may] be entitled to payment[s]  
3 by [the] Landlord [of] any additional amounts necessary to  
4 complete the work."

5 You agreed to that. Correct, Mr. Shomof?

6 A We agreed to the tenant election but tenant did not  
7 elect for me to stop work and they will continue the work.

8 Q Mr. Shomof --

9 A The tenant election was to ask to proceed with the work  
10 after April 1st.

11 Q My question is, Mr. Shomof, you agreed to this  
12 provision, correct?

13 A Yes.

14 Q And also you agreed that, under this provision, to the  
15 extent that you the landlord timely complete the work in a  
16 manner that's acceptable to the tenant "any remaining  
17 Construction Estimate Deposit[s]" will be dispersed to you  
18 subject to review and approval. Correct?

19 A Correct.

20 Q Now, Mr. Shomof, the parties -- that is, the landlord  
21 and the tenant -- did not enter into a written agreement to  
22 adjust the April 1st deadline, correct?

23 A Not exactly correct, no.

24 Q Is there a written agreement between the landlord and  
25 the tenant to adjust the April 1st deadline? Yes or no, Mr.

1 Shomof?

2 A It's not a yes or a no question. There is an e-mail  
3 from Delores allowing us to proceed with the work after  
4 April 1.

5 Q We're going to come to that e-mail. I think it's in  
6 May of 2017. But what I'm asking, Mr. Shomof, is there a  
7 document --

8 A Yeah. It's a month later.

9 Q Is there a document signed by you the landlord or your  
10 representative and the tenant that adjusts the April 1st  
11 deadline? Yes or no?

12 A A signed agreement, no, but there is an e-mail that's  
13 allowing us --

14 Q Thank you, Mr. Shomof.

15 Now, Mr. Shomof, you attached to your declaration a  
16 number of invoices that you claim that you as the landlord  
17 sent to the tenant and that the tenant then subsequently  
18 paid. Is that correct?

19 A Correct.

20 Q Okay. We'll look at a few of those if we could. So if  
21 you'd turn to tab 7, Mr. Shomof -- I'm sorry. Not tab 7.  
22 If you look to tab 8 -- I apologize. Tab 8, Mr. Shomof.  
23 This is Joint Exhibit number 4 which was the Exhibit number  
24 2 to your declaration. Now this, Mr. Shomof, is an invoice  
25 dated August 16th, 2017, invoice number 08001PR, in an

1 amount of just north of 1.5 million. Correct?

2 A Correct.

3 Q Okay. If you turn to tab 9, Mr. Shomof, this is Joint  
4 Exhibit 5, number 3 to your declaration. This here is  
5 another invoice also dated April (sic) 16th, 2017. It's  
6 also invoice number 08001PR. But this is in the amount of  
7 478,000, correct?

8 A Correct.

9 Q And on this document is a paid stamp of 8/12/17,  
10 correct?

11 A Correct.

12 Q If you turn the page, Mr. Shomof -- this is still  
13 within that tab -- you'll see yet another invoice also dated  
14 August 16th, 2017, also numbered 08001PR, again in the  
15 amount of 478,000 but this has a paid stamp of 8/18/17.  
16 Correct, Mr. Shomof?

17 A Are we looking at the same invoice copied twice?

18 Q Mr. Shomof, this is attached to your declaration. I'm  
19 just asking you if this is the evidence that you've  
20 submitted to the Court.

21 A Yes. Yes.

22 Q Now, Mr. Shomof, if you turn to tab 10, tab 10 is Joint  
23 Exhibit 6, number 4 to your declaration. This is another  
24 invoice dated August 16th, 2017. This one is invoice number  
25 08002PR. And this has a number -- amount just north of one

1 million dollars. Correct?

2 A Correct.

3 Q If you turn to tab 11, Mr. Shomof, this is Landlord  
4 Exhibit number 2, another invoice dated August 16th, 2017.  
5 Again, the number 08002PR, but this one's in the amount of  
6 983,000. Correct?

7 A Correct.

8 Q And finally, Mr. Shomof, if you look at tab 12, this is  
9 Joint Exhibit 7, number 6 to your declaration, another  
10 invoice from August 16th, 2017. This one is numbered  
11 08002A. And this is in the amount of \$18,853, correct?

12 A Correct.

13 Q Okay. Now in addition to these invoices, Mr. Shomof,  
14 you also attach to your declaration a set of backup invoices  
15 and checks, correct?

16 A Correct.

17 Q And this is a backup, the invoices and checks, that  
18 went to you or paid by you that were the backup for invoices  
19 you sent to Sears that Sears then paid, correct?

20 A Correct.

21 Q Now, Mr. Shomof, they were Exhibits 5, 8 and 10 to your  
22 declaration. They're Landlord Exhibits 2, 3 and 4. There's  
23 approximately 300 pages here, Mr. Shomof. You're familiar  
24 with these documents, correct?

25 A I am -- I have not reviewed every -- each of the

1 document.

2 Q You attached this to your declaration, did you, Mr.  
3 Shomof?

4 A Yes, but not in detail. Yes.

5 Q And you swore under oath that this was the backup for  
6 those invoices, correct?

7 A Correct, yes.

8 Q Mr. Shomof, how many of these invoices and checks are  
9 dated after April 1st, 2017?

10 A I am not sure.

11 Q You're not sure.

12 A No.

13 Q Well, I just received these on Friday but we've gone  
14 through these, Mr. Shomof. And I can represent to you that  
15 only 14 of these invoices are dated after April 1st, 2017.  
16 Do you have any reason to doubt that representation?

17 A I just don't remember it but I shall review it again.

18 Q And those 18 add up to less than \$80,000. Again, any  
19 reason to doubt that representation?

20 A Could very much be.

21 Q Okay. And some of these invoices, Mr. Shomof, date  
22 back to 2014, correct?

23 A Yes.

24 Q And some of them date back to 2015, correct?

25 A Correct.

1 Q And there are no invoices in the backup you provide to  
2 this Court dated after 2017, correct?

3 A There are.

4 Q Invoices within these three exhibits, Mr. Shomof?

5 A Invoices from my company to Sears.

6 Q Understood. I'm not asking about the single-page  
7 invoices that you sent to Sears. I'm talking about the  
8 backup, the work that was actually done. There are no  
9 invoices submitted to this Court dated after 2017, correct?

10 A The work that we have done and a third party that have  
11 done work, but there is other work that we have done that  
12 our labor worked and we billed Sears for it.

13 Q Mr. Shomof, you testified -- in your declaration, you  
14 wrote that this is the backup for the invoices that you  
15 submitted to Sears that Sears has paid. Correct?

16 A Correct.

17 Q Thank you.

18 Now let's look at that e-mail that we were talking  
19 about. It's tab 15 in your binder, Mr. Shomof. Now this is  
20 the e-mail you were referencing earlier, correct, with  
21 Dolores from Sears?

22 A Yes.

23 Q Okay. And if you go to the end of the e-mail chain --  
24 just for reference, it begins in May of 2017. Correct?

25 A It's such a small print I cannot see it.

1 Q I'm sorry, Mr. Shomof. This is what was produced  
2 attached to your declaration. So I apologize for that. I  
3 can represent to you, Mr. Shomof, that the e-mail's dated  
4 May 11th, 2017. Are you okay with that representation?

5 A Yes.

6 Q Okay. So this e-mail that you've pointed to was after  
7 the April 1st, 2017, correct?

8 A Correct.

9 Q And in the e-mail on the first page -- right? Again, I  
10 apologize that the font is small. It's May 11th at 2:17.  
11 This is an e-mail from Dolores. Dolores acknowledges in the  
12 e-mail that you've missed the deadline of April 1st, 2017.  
13 Correct?

14 A Yes.

15 Q And then she goes on to say, "With that being said" --  
16 or "that being the case, I'm asking that the HVAC and the  
17 seismic work be done at the same time. The expense of  
18 moving product and fixtures will be double if we need to do  
19 it twice. This is a great store for Sears and we do not  
20 want to affect the customers or associates more than  
21 needed." Correct?

22 A Yes. But I think you missed the paragraph when she  
23 said speak to legal and legal will -- and then she said  
24 after -- legal will approve it.

25 Q Well, let's look at her words, Mr. Shomof. It says "I

1 have spoken to legal" --

2 A If you don't mind, yeah. It sounds --

3 Q -- "and here are my remarks."

4 A -- like -- now what -- sorry.

5 Q "I've spoken to legal and here are my remarks." That's  
6 what Dolores wrote, correct?

7 A Yeah.

8 Q Okay. And so she acknowledged in the e-mail that you  
9 had missed the deadline. Correct?

10 A Yes.

11 Q And she said, in light of that, they want you to do the  
12 HVAC and the seismic together, correct?

13 A Yes.

14 Q Okay. And her assumption, if you look down in the next  
15 paragraph, was the seismic work -- the permits we pulled  
16 later that year, 2017, and the work will begin in January  
17 2018. Correct?

18 A Yes.

19 Q Okay. And above your associate, Leo, writes as it  
20 relates to the seismic -- it's number 2 in the top e-mail:  
21 We "anticipate having permits around September of this year  
22 and the goal beginning early 2018." Is that right?

23 A Correct.

24 Q Okay. Now I want to turn to the latest invoice, Mr.  
25 Shomof, that you had provided, which is tab 17 in your



1 binder. Now this, Mr. Shomof, is Joint Exhibit number 10.  
2 It was attached as Exhibit 17 to your declaration. But it's  
3 also the invoice that was attached in January in support of  
4 your original cure objection. Do you see that?

5 A Yes.

6 Q And this is in the amount -- it's dated January 23rd,  
7 2019. It's in the amount of just over 322,000, correct?

8 A Correct.

9 Q And this invoice has an assumption in it, doesn't it?

10 A What do you mean by --

11 Q If you look in the middle, there's an asterisk. And  
12 there's a note halfway down that says "Assuming Sears" --

13 THE COURT: I'm sorry. What exhibit is this?

14 MR. WEAVER: I'm sorry. We're in tab 17, Your  
15 Honor --

16 THE COURT: Of the witness binder?

17 MR. WEAVER: -- of the cross binder but it's also  
18 Joint Exhibit number 10.

19 THE COURT: Okay. Fine.

20 MR. WEAVER: Apologize, Your Honor.

21 THE COURT: Okay.

22 BY MR. WEAVER:

23 Q So there's an assumption in the middle of this invoice,  
24 correct?

25 A Yes. Correct.

1 Q And that assumption is that Sears did not pay for the  
2 equipment, correct?

3 A Yes. We will bill that amount -- we had the invoices  
4 sitting on the table and we were trying to clarify Sears  
5 paid for it or not. We have not gotten no answer. So we  
6 said assuming Sears did not pay that amount, 322,649 is  
7 owed.

8 Q You didn't know whether or not you'd been paid,  
9 correct, Mr. Shomof?

10 A We did not know if Sears paid it to the third party.

11 Q Ahh. So they could have paid it to the third party,  
12 Mr. Shomof. But you're seeking to recover it here, correct?

13 A Assuming -- if you look at what it says in the middle,  
14 assuming that Sears did not pay for it. Yes.

15 Q Mr. Shomof, you provided absolutely no backup for this  
16 invoice, correct?

17 A What -- the backup that we provided, that 75 percent --  
18 the actual fact of the (indiscernible) that 75 percent of  
19 the work is completed. And we showed it in the pictures.  
20 And the pictures -- you asked for the judge to basically  
21 omit it.

22 Q Mr. Shomof, you provided absolutely no backup to this  
23 invoice, correct?

24 A No backup for the \$205,000 if it was paid or not, we  
25 didn't know.

1 Q No backup for the 322,000 you're claiming through this  
2 invoice. Correct, Mr. Shomof?

3 A Backup to you or backup to Sears?

4 Q In this case. Backup in this case.

5 A I have to look into it. No, I'm not sure.

6 Q It's not attached to your declaration, correct, Mr.  
7 Shomof?

8 A If it's not then it's not --

9 Q It's not.

10 Now let's turn to the seismic retrofit, Mr. Shomof.  
11 And for this, we'll probably go back to tab 6, which is the  
12 2015 amendment. And Mr. Shomof, under the 2015 amendment,  
13 you as the landlord agreed to be responsible for all the  
14 costs, correct?

15 A Responsible of all the -- which costs?

16 Q All the costs associated with the construction called  
17 for in the amendment. Correct?

18 A Yes.

19 Q Okay. And if you look at paragraph 8, which is page 17  
20 of 135. We're still in tab 6. This is Joint Exhibit number  
21 2.

22 A Yes.

23 Q Under "Seismic Work", you agreed that you were  
24 responsible for all necessary seismic repairs and  
25 improvements, correct?

1 A Yes.

2 Q And you also agreed that you would take best efforts to  
3 pull the permits 12 months after the city of Los Angeles  
4 approved, correct?

5 A Correct.

6 Q And then 12 months after that to complete the work.  
7 Correct?

8 A Correct.

9 Q You also agreed that the plans and specifications,  
10 schedules, authorized hours of construction activity and  
11 remediation plan for the seismic work would be pre-approved  
12 by the tenant pursuant to the demolition and construction  
13 protocol attached to the amendment. Correct?

14 A Correct.

15 Q And you also agreed that you would conduct this work in  
16 a manner that creates the minimum possible visual and noise  
17 inconvenience to the tenant and the customers. Correct?

18 A Correct.

19 Q Now, Mr. Shomof, you pulled the permits for the seismic  
20 retrofit in February of this year, correct?

21 A Correct.

22 Q Now your son, Jonathan, sent a letter to counsel for  
23 Sears, for the tenant, in September of 2018, correct?

24 A Correct.

25 Q And this is tab number 18 in your binder. It is Joint

1 Exhibit number 3. Let me know when you're there, Mr.

2 Shomof.

3 A I'm here. I've seen it.

4 Q And in this letter, Jonathan says, "Hopefully, Sears  
5 will agree to close from February 1st, 2019 to August 15,  
6 2019." Correct?

7 A Correct.

8 Q Now nowhere in this letter, that's tab 18, is there a  
9 detailed scope of work or detailed set of construction  
10 plans, correct?

11 A Yes. What scope of work there is attached. If you  
12 look at Exhibit 3 --

13 Q Well --

14 A -- it basically detail how we're going to -- how we're  
15 going to be -- start the job and setting up what is --

16 Q Is that the picture, Mr. Shomof? I'm sorry. This one  
17 doesn't have page numbers. I apologize.

18 A Picture of detail of how will it be. And with  
19 timeline. Again, on Exhibit 3, the page after that --

20 Q And we'll come back to the timeline in a second. But  
21 there's no construction plans here, correct, Mr. Shomof?

22 A Assuming Sears will want to proceed with continuing,  
23 plans will be submitted. The plan is the size of -- we have  
24 plans this size of my stand where I'm sitting.

25 Q So you were looking for a negotiation. Correct, Mr.

1 Shomof?

2 A I was not looking for negotiation. I was looking to  
3 agree on strategy how we're going to start construction.

4 Q So this related to strategy, not the actual  
5 construction plans. Correct, Mr. Shomof?

6 A Can you repeat it?

7 Q This related to a strategy issue not the actual  
8 construction specifics. Correct, Mr. Shomof?

9 A Actual construct -- we were planning to start  
10 construction in February.

11 Q But there's no plans in this letter, correct?

12 A Well --

13 Q Yes or no, Mr. Shomof?

14 A Well, there is not, no.

15 Q Okay.

16 A There is not.

17 Q Right. And there is a timeline you said, Mr. Shomof,  
18 in here. And this timeline assumes, does it not, that Sears  
19 would shut down for six months. Correct?

20 A Yes.

21 Q There's no other timeline in this letter, correct?

22 A In that letter, no.

23 Q Okay.

24 A But probably other ones, yes.

25 Q But this is the only letter you've attached to your

1 declaration, correct, Mr. --

2 A Yes.

3 Q -- Shomof?

4 A This is what we -- we have to seal.

5 Q Okay. And if you look at tab 19, Mr. Shomof, this is  
6 the e-mail that Jonathan sent to counsel for tenant that  
7 attached the letter at the top. And below there's a  
8 response from counsel for the tenant. Correct?

9 A Yes.

10 Q And in that response, counsel says, "To be clear, this  
11 letter does not appear to be offered in the spirit in which  
12 we discussed it last week. It comes across more as a  
13 direction from you as opposed to offering a proposed  
14 timeline and outlining some issues that remain to be  
15 negotiated before the process begins."

16 A Yes.

17 Q "The history of this project is riddled with errors  
18 that have put our employees and patrons at risk and reach  
19 negotiated protocols, not to mention broken promises about  
20 timing. Just two months ago, you notified us that you would  
21 likely not pursue this project."

22 This was the response you got from your letter,  
23 correct?

24 A Yes.

25 Q And if you turn the page, Mr. Shomof, at the end of

1 counsel's response to you, he states: "I have offered to  
2 meet with your lawyer so we can start to work through these  
3 issues. And I renew this offer." That's what he told you.  
4 Correct, Ms. Shomof?

5 A Yes.

6 Q And below that, your son forwards the letter to you and  
7 said, "Just want to confirm that you saw this e-mail. Let  
8 me know if you want to respond." Correct?

9 A Yes.

10 Q And there is no written response to that e-mail,  
11 correct, Mr. Shomof?

12 A It's probably written response from my attorney to him.

13 Q You didn't attach any written response to your  
14 declaration, correct, Mr. Shomof?

15 A So you're asking me if I attached a written response or  
16 you're asking me if there was a written response to --

17 Q Well --

18 A -- Steve?

19 Q -- Mr. Shomof, all I can do is talk about the evidence  
20 that you've tried to put before the Court. And I'm asking,  
21 is there any evidence in the record before this Court of a  
22 written response to this e-mail. Yes or no?

23 A If you don't have it here then it's not.

24 Q Mr. Shomof, the entitlements issued by the city of Los  
25 Angeles, they have not expired yet, correct?



1 A Not yet. We have another probably a lifetime --

2 THE COURT: I'm sorry?

3 A -- or another month.

4 THE COURT: How many --

5 THE WITNESS: Maybe another 30 days before it  
6 expiring.

7 BY MR. WEAVER:

8 Q You testified in your declaration that September 16th  
9 is the date you provided. Correct, Mr. Shomof?

10 A I testified to what?

11 Q September 16th is in your declaration, correct?

12 A Yes.

13 Q Okay.

14 A It's -- I think it's a little bit before September  
15 16th.

16 Q So your declaration isn't correct, Mr. Shomof?

17 A I am not sure. I think it's before. It's -- my  
18 deadline was six months from February 16th. So whatever it  
19 comes.

20 Q Understood, Mr. Shomof. And on June 24th, Mr. Shomof,  
21 when I deposed you, you testified under oath that the  
22 project that we're discussing was not dead, correct?

23 A You asked me if the project is dead and I answered back  
24 to you I put my lifetime into this project. I want to  
25 believe not to. The reason is because I was negotiating

1 with someone to JB and that negotiation fell through.

2 Q Mr. Shomof, if you turn to tab 1 in your binder, that's  
3 a copy of your deposition transcript. You remember being  
4 deposed on June 24th, Mr. Shomof?

5 A I do, yes.

6 Q Your counsel was there, correct?

7 A Yes.

8 Q Court reporter was there, correct?

9 A Yes, I know.

10 Q You swore to tell the truth at that time?

11 A Absolutely.

12 Q If you would turn with me, Mr. Shomof, to page 146 of  
13 your deposition --

14 A What page again?

15 Q 146, Mr. Shomof. And starting on line 20, I'm going to  
16 read the question and answer. If you could read along with  
17 me, please.

18 "Q Mr. Shomof, is the development plan for Boyle Heights  
19 that we've been discussing today dead?

20 "A I hate to say, I literally hate to say even maybe. I'm  
21 trying. This is something that is my flux sheet on my  
22 projects. I've done 25 other projects. This is the biggest  
23 one. This is a -- I put my heart and soul into it. I want  
24 to get it to happen and developed. I've been through hell  
25 with the financing. I've been through hell with a lot of

1 getting permits. It was hard. The answer is I hope that it  
2 is in some way I can maybe salvage it.

3 "Q So the answer is no, it is not dead?

4 "A Yes. The answer is no, it is not dead."

5 Did I read that correctly, Mr. Shomof?

6 A Yes, you did.

7 Q Okay. And in your declaration of July 26th, Mr.  
8 Shomof, you testified the first time that during the  
9 deposition, you were in discussion with investors for a  
10 joint endeavor, correct?

11 A Correct.

12 Q And during the deposition when I asked you about  
13 whether or not the project was dead, you didn't say a word  
14 about those investors. Correct? Yes or no?

15 A The answer that you -- you've received here I chose the  
16 person with hope.

17 Q Understood.

18 A I hoped that the project would not die.

19 Q But you didn't say anything about other investors.  
20 Correct, Mr. Shomof?

21 A I was not asked if I have other investors. So I did  
22 not say that.

23 Q So you didn't say a single word about other investors  
24 when we were talking about whether the project was dead.  
25 Correct, Mr. Shomof?

1 A Did you ask me if there was other investors?

2 Q It's a yes or no question, Mr. Shomof.

3 A No. It doesn't say that -- it doesn't say at my  
4 deposition what I conduct.

5 THE COURT: I can read the deposition.

6 MR. WEAVER: Understood, Your Honor. I'll move  
7 on.

8 BY MR. WEAVER:

9 Q Mr. Shomof, to keep the entitlements valid, you need to  
10 begin construction, correct?

11 A Correct.

12 Q And to begin construction, you need to call in an  
13 inspector to show that you've started construction, correct?

14 A Correct.

15 MR. WEAVER: No further questions at this time,  
16 Your Honor.

17 THE COURT: Okay.

18 (Pause)

19 THE COURT: Any redirect?

20 MR. KUPETZ: Yes. Thank you, Your Honor.

21 THE WITNESS: Your Honor, if you don't mind, can  
22 you give me a bottle of water?

23 THE COURT: Sure.

24 THE WITNESS: Thank you.

25 THE COURT: That's fine.

1 THE WITNESS: Thank you very much.

2 REDIRECT EXAMINATION

3 BY MR. KUPETZ:

4 Q Mr. Shomof, I'd like to ask you some questions first  
5 with regard to the construction estimate deposit. Prior to  
6 the commencement of Sears' Chapter 11 case, what sort of  
7 communications were going on with representatives at Sears  
8 and the landlord with regard to construction estimate  
9 deposit?

10 A Rephrase your question.

11 Q Well --

12 A And if you can speak louder.

13 Q Okay. I'm sorry. I'm sorry. Let me rephrase it.  
14 It's too broad a question, I think.

15 After April 1 of 2017 and prior to the commencement of  
16 Sears' Chapter 11 case, with respect to the construction  
17 estimate deposit, did the landlord and representatives of  
18 Sears have ongoing regular communications?

19 A Yes.

20 Q And what was the substance of those communications?

21 A On the continuous work that is happening way after  
22 April 1.

23 Q And was Sears' representatives asking the landlord to  
24 do certain work covered by the construction estimate deposit  
25 after April 1, 2017?

1 A We were doing what was agreed on to do. It may not be  
2 completed on April -- before April 1 of 2017. So we were  
3 continuing -- continue to finish what left to be done.

4 Q And was --

5 A As of now, it's not 100 percent completed.

6 Q And after April 1st of 2017, was Sears asking you to do  
7 that work?

8 A Yes.

9 Q And were the communications between landlord and Sears  
10 to the effect that landlord would be reimbursed from the  
11 construction estimate deposit for that work?

12 MR. WEAVER: Objection, Your Honor. It's leading,  
13 that question, Your Honor.

14 THE COURT: You should rephrase it.

15 BY MR. KUPETZ:

16 Q That work that was being done after April 1, 2017, with  
17 respect to the categories covered by the construction -- by  
18 the construction estimate deposit --

19 THE COURT: Who was to pay for it? Or how was it  
20 to be paid for?

21 THE WITNESS: As agreed on the agreement, as  
22 construction proceeding and completing, they would pay us.  
23 And they continued paying us after April 1 of 2017. They  
24 paid us a year later in 2018, April of 2018. They continued  
25 paying us.

1 BY MR. KUPETZ:

2 Q And that payment came from the construction estimate  
3 deposit as you understand it?

4 A The payment was coming from the payment -- from the  
5 deposits, yes.

6 Q And that was for work done after April 1, 2017.

7 A Correct.

8 Q Now in doing work after April 1, 2017, was Landlord  
9 relying on representations of Sears about getting paid?

10 MR. WEAVER: Again, Your Honor. He's testifying  
11 here.

12 THE COURT: You have to stop leading.

13 MR. KUPETZ: I'll rephrase it.

14 BY MR. KUPETZ:

15 Q Why did you -- why did Landlord do work after April 1,  
16 2017?

17 A Because we owed it as agreed. Job needs to be  
18 completed. So we continued doing it after April 1 and -- of  
19 2017 and we were getting paid, just like I said before.

20 Q Now is it your understanding -- did Sears make any  
21 requests to Landlord with regard to the timing of the work?

22 A Repeat it again.

23 Q With respect, for example, to the HVAC work, was there  
24 a request made by Sears?

25 A Yes. They preferred to do it together with the seismic

1 retrofit. That's her recommendation. Dolores -- we wanted  
2 to do it before and get paid, the HVAC. She said we rather  
3 -- after she's basically specifying "I spoke to legal and we  
4 prefer doing it together with the seismic."

5 Q Now what is the status of the completion of the work  
6 covered by the construction estimate deposit?

7 A All the HVAC units which I have pictures -- and I would  
8 love to share it with the judge -- Your Honor here, all the  
9 HVAC, the compressor on the outside of Sears space, it's  
10 already been installed and connected. All the IT room, all  
11 the electronics of their computers and everything has been  
12 relocated into the Sears space. HVA -- a big portion of the  
13 HVAC was done in the IT room. All the façade was completed.  
14 All the signage were completed and installed. The majority  
15 of the work was done. What got left to do is put the HVAC  
16 condensers inside Sears' space. And the condensers, it's  
17 already been paid for, installed on Sears' property in a  
18 containers which I attached pictures to show that the  
19 condensers are there. We were ready to do it. But they  
20 asked us to do it at the later time. When I say they, I  
21 mean Sears. Dolores from Sears.

22 Q Now after the commencement of Sears' Chapter 11 case,  
23 did Landlord receive any substantive communications or  
24 response from Sears with regard to any type of construction  
25 at the property?



1 A After what date?

2 Q The commencement of the Chapter 11 case which was mid-  
3 October of last year.

4 A When Sears went into bankruptcy and that was shocking  
5 for us, no communication whatsoever with Sears. Everything  
6 just died.

7 Q Now is it correct -- I know counsel for Transform asked  
8 you about communications with Mr. Velkei. Is it correct  
9 that with respect to the renovation of the project that  
10 Landlord was in communications with Sears' counsel, Mr.  
11 Velkei?

12 A I was continuously meeting with Steve Velkei and Alan  
13 Shaw from Sears. Steve Velkei is Sears' attorney. Alan  
14 Shaw is Sears' representative in regards to construction.  
15 We met few times and we were talking about how we were going  
16 to be proceeding with the construction of Sears.

17 Q And what did Mr. Velkei tell you in terms of further  
18 communications once Sears commenced its Chapter 11 case?

19 A Again, Steve is the only contact that I had. I tried  
20 getting a hold of Alan Shaw. Alan Shaw was either fired or  
21 quit or laid off. So there was no -- nowhere to be found.  
22 Alan Shaw was nowhere to be found, no reply whatsoever from  
23 Sears. I kept on going back to Steve. And up until I would  
24 say a month through later when Steve says let me Izek, I'm  
25 in limbo myself. I don't know where he's going. At one

1 time, Steve was get -- got laid off and rehired again. So  
2 Steve says, Izek, the best thing for you I recommend you get  
3 yourself a bankruptcy attorney to help you here.

4 Q And is that what you did?

5 A And that's what exactly I did.

6 Q And then did you continue on behalf of the landlord to  
7 try to reach out to Sears?

8 A Repeatedly.

9 Q And did you get any substantive response from Sears?

10 A Nothing. Even Steve himself, attorney for Sears, could  
11 -- couldn't get a hold of no one.

12 Q With respect to the current status of the project and  
13 whether or not it's dead and the questioning that you were  
14 receiving, what is your view of the current status of the  
15 project?

16 A Can you repeat it again, please? You were asking me a  
17 question?

18 Q Yes. What is the current status of the project, the  
19 renovation and rehabilitation of the property, the big  
20 project, not --

21 A For the overall project?

22 Q Yes.

23 A What is the status of it? It just died out. I mean,  
24 the lender pulled away. Once the lender pulled away, I have  
25 no funds to basically start construction. So died out.

1 Q And why did that occur?

2 A Because there was a condition -- one -- there was a  
3 condition with the lender that they want to see an agreement  
4 with Sears that they will allow us to go in and do the  
5 seismic retrofit. They were afraid -- they knew that Sears'  
6 bankruptcy, it's an issue. They were afraid to finalize the  
7 loan and start funding. And then I have no access to Sears  
8 which I told them Sears are occupying 70 percent of the  
9 ground floor. I have another 30 percent of the ground floor  
10 that I can start construction in the 70 per -- in the 30  
11 percent. And they said what happened if Sears would go in  
12 bankrupt for another year and they're not going to give you  
13 access to their space. So that's why I was reaching out to  
14 Sears repeatedly to try to some kind of an agreement from  
15 them to give my lender to assure the loan or to fund the  
16 loan but to know if they're back in April of 2019 -- March  
17 or April. They just send us a letter and say we are pulling  
18 off, pulling away.

19 MR. KUPETZ: Thank you.

20 THE COURT: Any recross?

21 MR. WEAVER: I'll be brief, Your Honor.

22 RECROSS-EXAMINATION

23 BY MR. WEAVER:

24 Q Mr. Shomof, the evidence that you've submitted in this  
25 case in support of the work that you've done is contained in

1 the three exhibits that we've been talking about, the  
2 invoices, correct? That's the evidence you submitted.

3 A I submitted more than that. I don't know what you're  
4 showing. I submitted bunch of invoices here that were paid  
5 after -- all the way up to April of 2018. And it seems like  
6 you're not talking about it.

7 Q Well, Mr. Shomof --

8 A And I'm wondering why.

9 Q Mr. Shomof, you testified before that some of the  
10 invoices are from 2014, correct? That you incurred. 2014,  
11 correct?

12 A I testified because you mention. I said could be, yes.

13 Q And the first invoice from you to Sears is in 2017,  
14 correct?

15 A Wait a minute. I am little confused. The agreement  
16 occurred with Sears on 2015.

17 Q Correct.

18 A And you're saying --

19 Q The first invoice --

20 A The amended -- hold on.

21 Q -- that you sent --

22 A Hold on.

23 Q -- in to Sears --

24 A I'm a little confused here. If you don't mind, let me  
25 ask you a question. What you're saying here is work was

1 done prior to the amendment of the agreement with Sears?

2 Q By looking at the calendar, that would seem to be the  
3 case. But that's not my question, Mr. Shomof. My question  
4 is, you've submitted evidence that says there was -- part of  
5 the backup is from 2014/2015. The first invoice that you  
6 sent to Sears is dated August 16th, 2017. Correct?

7 A The first invoice?

8 Q That you sent to Sears.

9 A Was when?

10 Q August 2017. Correct?

11 A Hold on. I have it here. Before I answer, let me just  
12 see it and make sure.

13 Yes. I have August 16 --

14 Q 2017. Correct, Mr. Shomof?

15 A Correct.

16 Q Okay. Now, Mr. Shomof, you also testified about having  
17 possession of 30 percent of the ground floor of the  
18 building, correct?

19 A Correct.

20 Q You could go tomorrow and begin construction on that 30  
21 percent. Correct, Mr. Shomof?

22 A I cannot go tomorrow and start construction because I  
23 have no financing.

24 Q But for financing, Mr. Shomof, you could tomorrow -- on  
25 Saturday, perhaps not -- on Monday to the 30 percent and

1 begin construction. Correct, Mr. Shomof?

2 A Except for funding, yes.

3 MR. WEAVER: No further questions, Your Honor.

4 THE COURT: Okay. Any redirect on that?

5 MR. KUPETZ: No, Your Honor.

6 THE COURT: Okay. You can step down, sir.

7 THE WITNESS: Step down?

8 THE COURT: Yeah.

9 (Witness excused)

10 MR. WEAVER: Your Honor, are you prepared to hear  
11 argument at this time?

12 THE COURT: Well, let me just make sure. Is there  
13 any other evidence other than what's in the record and the  
14 testimony that I've just heard?

15 MR. WEAVER: Nothing from Transform, Your Honor.

16 THE COURT: Okay.

17 MR. KUPETZ: Just the declarations.

18 THE COURT: Right. Those are already in evidence.  
19 Okay.

20 Just going back to the evidentiary rulings at the  
21 start of the hearing, I will admit the invoices in Landlord  
22 2 through 4 in that evidence binder.

23 (Landlord's Exhibits 2 through 4 received in evidence)

24 THE COURT: Okay. So then I will hear brief oral  
25 argument.

1 MR. WEAVER: I will try to be brief, Your Honor.  
2 Again, Andrew Weaver, Cleary Gottlieb, on behalf of  
3 Transform.

4 Your Honor, as you know, on May 13, 2019, the  
5 debtors assumed and assigned the vast majority of its leases  
6 to Transform. Since then, Transform has worked to resolve  
7 any outstanding landlord objections and continues to make  
8 good progress on that front. Unfortunately, we were not  
9 able to reach consensual resolution as to this property,  
10 Your Honor, which is why we're here today.

11 The store at issue, Your Honor, occupied the  
12 portion of the building on East Olympic Boulevard in Los  
13 Angeles and was subject to a sale lease back in 2004. The  
14 building and the property are also the subject of certain  
15 tax entitlements in favor of the landlord that are tied to  
16 the redevelopment project. Now this store is a key part of  
17 Transform's go forward plan, Your Honor. And it's actually  
18 one of the best performing stores in the Sears portfolio.

19 There are two disputes at issue here before Your  
20 Honor. And both of them are improper attempts by the  
21 landlord to benefit from the Sears bankruptcy and present no  
22 actual contract of fault that would be the basis of a proper  
23 cure objection.

24 The first, Your Honor, the landlord seeks the  
25 return of a construction estimate deposit when there is no

1 dispute to the fact that the landlord failed to meet an  
2 unambiguous deadline. And more importantly, Your Honor, the  
3 work covered by that deposit is not yet complete. So  
4 there's nothing, in fact, for us to be deciding until that  
5 work is done.

6 The second, Your Honor, the landlord invokes the  
7 covenant of good faith and fair dealing in order to try and  
8 collect speculative consequential damages due to the fact  
9 the landlord has not moved forward with the project and is  
10 at risk of losing those tax entitlements.

11 Just briefly in background, Your Honor, the  
12 operative lease here is Joint Exhibit 1. It's from 2011.  
13 This is before the landlord had bought the building. And  
14 it's very clear in paragraph 2 that the parties acknowledge,  
15 most critical, the successful operation of the business at  
16 the premise that the tenant have access, use and enjoyment  
17 of the building.

18 Now following the landlord's purchase of the  
19 building, Your Honor, the parties entered into a 2015  
20 amendment whereby the 2011 lease still controls the parties'  
21 responsibilities and obligations except to the extent the  
22 2015 amendment conflicts and the amendment would then, Your  
23 Honor, control.

24 Now, Your Honor, we're here on a cure dispute.  
25 And Your Honor, of course, is well familiar with U.S.C.



1 365(b) which basically provides that if there's a default  
2 under an unexpired lease, the trustee, or here that are in  
3 possession are here Transform, must cure that default and  
4 compensate for any actual pecuniary loss to such party  
5 resulting from such default. Now, Your Honor, there's no  
6 dispute as to the effectiveness of the leases. The leases  
7 are in effect and have not expired.

8 There are two categories, Your Honor, of what we  
9 call proper cure objections. The first is for CAM charges.  
10 In the original cure objection filed in January, the  
11 landlord sought over \$5,000 in CAM charges. Those charges  
12 weren't actually due until February. In February, the  
13 tenant did, in fact, pay those CAM charges with check number  
14 183116. For some reason, the landlord did not cash that  
15 check, Your Honor.

16 Arguably, they're fair to cash a check with way  
17 unique basis for claim there but Transform is prepared, Your  
18 Honor, to resubmit a check for that CAM amount if they  
19 assume and assign the lease.

20 THE COURT: Okay.

21 MR. WEAVER: The second, Your Honor, is for  
22 property taxes, again, just south of \$44,000. There's no  
23 dispute as to that amount and it's typical of all of our  
24 orders, within five business days of entry of the order,  
25 Transform will provide those funds to the landlord.

1 THE COURT: Okay.

2 MR. WEAVER: So those are proper cure objections,  
3 Your Honor. But what is happening -- what we're arguing  
4 about today, Your Honor, is quite a big stretch from that.

5 First, let's talk about the construction estimate  
6 deposit. And here, Your Honor, of course, we have to start  
7 with the agreement. And this is, again, Joint Exhibit  
8 number 2. And this, Your Honor, provides clearly for a list  
9 of construction projects that the landlord has to perform.  
10 And, Your Honor, if we look to paragraph 25 -- I won't  
11 belabor the point. You just heard it read during cross.  
12 But here is where the deposit is put in to 3.25 million.  
13 There's a list that must be completed by April 1st. And to  
14 the extent that the landlord timely completes the work and  
15 it's acceptable, they will get any that's left over. But it  
16 is clear that if they don't meet the deadline, the funds  
17 "shall be released to the Tenant, at Tenant's election". So  
18 the tenant can cause the work to be completed and seek more  
19 money for the landlord if necessary.

20 But, Your Honor, that's not the only relevant  
21 portion of the contract.

22 THE COURT: Well, can we just walk through this?

23 MR. WEAVER: Sure. Happily, Your Honor.

24 THE COURT: First of all, the introductory  
25 paragraph in paragraph 25 sets up the three and a quarter

1 million construction estimate deposit "to partially secure  
2 Landlord's design, repair, construction and completion  
3 obligations under this agreement". We've already  
4 established that those obligations are introduced by  
5 paragraph 2 and they go through paragraph 10.

6 MR. WEAVER: Correct, Your Honor.

7 THE COURT: And it includes seismic work.

8 MR. WEAVER: It does.

9 THE COURT: But only -- but we'll go back to that  
10 in a second.

11 The paragraph then says that "Tenant shall in turn  
12 within a reasonable time thereafter, but in any event within  
13 thirty (30) days of Landlord's written request, deposit the  
14 Construction Estimate Deposit with either First American  
15 Title Insurance Company or another title insurance company  
16 acceptable to Tenant ('The Construction Fund Escrow') to  
17 enable Landlord to be able to draw upon those funds in the  
18 Construction Fund Escrow to pay for Landlord's design,  
19 repair, construction and completion work as required per  
20 this [Agreement] on terms acceptable to the Tenant upon  
21 joint written instruction given to the escrowee".

22 The escrow wasn't done, right?

23 MR. WEAVER: Correct, Your Honor. The parties  
24 agreed not to put it in the escrow.

25 THE COURT: But that agreement didn't vary

1 anything else about the payment of the construction -- of  
2 the landlord's design, repair, construction and completion  
3 work for this agreement?

4 MR. WEAVER: Correct.

5 THE COURT: You're clear on that, right? There's  
6 no agreement changing that paragraph in writing.

7 MR. KUPETZ: Right. Just as there was no  
8 agreement with respect to the deposit not being held by a  
9 third party.

10 THE COURT: Well, I mean, it says within a  
11 reasonable time. I gather the parties decided there was no  
12 reasonable time. And there was no request by the landlord  
13 to put it in.

14 MR. KUPETZ: Correct.

15 THE COURT: Okay. So then paragraph (d) says:  
16 "In the event Landlord does not complete the work  
17 contemplated in Sections 3, 4, 6 and 7 by April 1, 2017".  
18 Now, 3, 4, 6 and 7 deal with HVAC -- I'm actually going out  
19 of order here. Low voltage service, HVAC, plumbing --

20 MR. WEAVER: Signage and façade, Your Honor.

21 THE COURT: Right.

22 MR. WEAVER: Not plumbing, technically.

23 THE COURT: Not plumbing.

24 MR. WEAVER: Technically, not plumbing.

25 THE COURT: Façade and signage. Okay. "[B]y

1 April 1, 2007 (sic), the remainder of funds in the  
2 Construction Fund Escrow shall be released to Tenant, at  
3 Tenant's election, so that Tenant can cause the work to be  
4 completed and Tenant shall be entitled to payment by  
5 Landlord [of] any additional amounts necessary to complete  
6 the work" which is consistent with paragraph 2 which says  
7 the landlord shall bill all the costs.

8 So I believe it's undisputed, but I just want to  
9 confirm this, that the work covered by Sections 3, 4, 6 and  
10 7, none of that work was completed by April 1?

11 MR. WEAVER: I don't think it's none of the work,  
12 Your Honor, but it was not completed.

13 THE COURT: Some of it. Some of it was completed.

14 MR. WEAVER: Some of it was. And --

15 THE COURT: No. But it's a different -- I didn't  
16 ask that question correctly.

17 MR. WEAVER: No one objected, Your Honor.

18 THE COURT: Each one of those sections  
19 contemplated a project. Is it understood that none of those  
20 four projects was completed by April 1? It was worked on, I  
21 understand that. But none of them was completed by April 1?

22 MR. KUPETZ: That's correct.

23 THE COURT: Okay. So the contract provides then  
24 that if that work, the project, isn't done by April 1, 2007  
25 (sic), "the remainder of funds shall be released to Tenant,

1 at Tenant's election". Now here, the tenant was still  
2 holding it, right?

3 MR. WEAVER: Correct, Your Honor.

4 THE COURT: But it's also agreed that Tenant  
5 didn't make any election so that it could cause the work to  
6 be completed, right?

7 MR. WEAVER: Well, Your Honor, I don't think there  
8 is anything -- there's really nothing in the record about a  
9 formal election.

10 THE COURT: Right.

11 MR. WEAVER: And I think part of this, Your Honor,  
12 is that this dispute isn't ripe for a cure objection. If  
13 there was a dispute in the future, I believe Sears would be  
14 able to put forward evidence that --

15 THE COURT: Well, I'm just walking through this.

16 MR. WEAVER: No.

17 THE COURT: I'm just trying --

18 MR. WEAVER: Understood.

19 THE COURT: -- to get the facts down.

20 MR. WEAVER: Fair. My essential --

21 THE COURT: I understand the argument. I just --

22 MR. WEAVER: Well, it's not the argument. It's a  
23 fact -- I don't want to testify, Your Honor, but I  
24 understand Sears did spend money, Your Honor. I just --

25 THE COURT: Well, that's my question is, "at

1 Tenant's election, so that Tenant could cause the work to be  
2 completed". So, you know, that clause seems to contemplate  
3 the reasonable agreement between the parties that if the  
4 landlord couldn't do it, at tenant's election, that tenant  
5 would do it -- have someone do it for the tenant. I mean,  
6 Sears doesn't do its own work, I'm assuming --

7 MR. WEAVER: Correct, Your Honor.

8 THE COURT: -- for all of these things.

9 Now there is a little bit in evidence just based  
10 on what I heard from the testimony that there was perhaps  
11 some assumption that Sears might be paying for something  
12 already. That was the invoice that had the asterisk on it  
13 for the 250 something thousand.

14 MR. WEAVER: Correct, Your Honor.

15 THE COURT: Is there any other evidence in the  
16 record that Sears was doing some of this work or subcontract  
17 -- contracting it out to someone else?

18 MR. WEAVER: Your Honor, there's not. There was  
19 not evidence put in. Again, well, to answer your question,  
20 no, Your Honor. I can explain if you'd like. The answer is  
21 no, Your Honor.

22 THE COURT: Okay.

23 MR. KUPETZ: Your Honor, as far as the landlord  
24 knows, Sears hasn't paid for anything --

25 THE COURT: Well, all right. But that's neither

1 here nor there.

2 MR. KUPETZ: There's no evidence in the record  
3 that Sears paid for anything.

4 THE COURT: Except the disastrous bill. But  
5 that's -- there's no evidence that that actually was the  
6 case, right?

7 MR. WEAVER: Well, I'd note, Your Honor, there's  
8 no evidence of anything about that bill. But --

9 THE COURT: No. That's fine. I agree with that.

10 MR. WEAVER: But nothing about the actual --  
11 correct, Your Honor.

12 THE COURT: Okay. So, in any event, it seems that  
13 the agreement did provide that, you know, if the landlord  
14 didn't meet its deadline then Sears could basically take  
15 over the work how ever it wanted to --

16 MR. WEAVER: Correct.

17 THE COURT: -- subject to the landlord being  
18 liable for it.

19 Then the next sentence says: "Upon Landlord's  
20 completion of the work described in Sections 3, 4, 5, 6 and  
21 7 in a timely manner, and its inspection and acceptance by  
22 Tenant, any remaining Construction Estimate Deposit funds  
23 shall be dispersed to Landlord subject to review and  
24 approval of the parties regarding the amount in question."

25 So we have some testimony from the witness that



1 most of the work was completed. And he also says that the  
2 HVAC condensers -- well, it had been ready to be installed  
3 but that "Sears asked to put that off". Do we have -- is  
4 there anything in the record that says that work hasn't been  
5 completed? I mean, there's testimony that says 75 -- I  
6 mean, the declaration says 75 --

7 MR. WEAVER: Declaration itself, Your Honor, says  
8 the work isn't done.

9 THE COURT: Right. That's correct, right? The  
10 declaration says 50 percent, 75 percent --

11 MR. KUPETZ: Well --

12 THE COURT: -- parts of it --

13 MR. KUPETZ: -- it says the work --

14 THE COURT: It goes through -- let me turn to it.

15 MR. KUPETZ: Yeah. We should probably look --

16 MR. WEAVER: Paragraph --

17 MR. KUPETZ: -- at the declaration.

18 MR. WEAVER: -- 33 --

19 THE COURT: Right.

20 MR. WEAVER: -- I think, or so, Your Honor.

21 THE COURT: Right. So I'm looking at Mr. Shomof's  
22 declaration in support of the reply.

23 MR. WEAVER: 34, Your Honor.

24 THE COURT: Paragraph 34? "The HVAC work is  
25 approximately 75% complete. The remaining approximate 25%

1 of the job includes labor to install condensers". He  
2 doesn't really refer -- well, I'm sorry. Let me go back.

3 And then 35 says, "Other than the HVAC work, the  
4 only remaining work to be done" is plumbing. But that's not  
5 -- that's a different time frame.

6 MR. WEAVER: Correct, Your Honor. Well, it's the  
7 same time frame. It's just not covered by the subsection --

8 THE COURT: Right.

9 MR. WEAVER: -- (d).

10 THE COURT: Right. Exactly. So -- and obviously,  
11 that work was not done -- based on the declaration and the  
12 invoices, that work was not done by April 1, 2017.

13 MR. WEAVER: It's not disputed, Your Honor.

14 THE COURT: So, I guess, to me, and I'd like the  
15 parties to address this, the dispute as to any right to get  
16 the remainder of the tenant escrow depends on the meaning of  
17 the word "timely" in that second sentence. Right? Because  
18 that -- it doesn't say in the second sentence, "Upon  
19 Landlord's completion of the work described in Sections 3,  
20 4, 5 and 6 by April 1". It says in a "timely manner" --

21 MR. WEAVER: Correct, Your Honor.

22 THE COURT: -- "and its inspection and acceptance  
23 by Tenant". Now you're saying that "timely" must refer back  
24 to April 1.

25 MR. WEAVER: I don't know how it wouldn't, Your

1 Honor. In addition to the acceptance by the landlord -- by  
2 the tenant. I'm sorry, Your Honor.

3 THE COURT: Right.

4 MR. KUPETZ: And, Your Honor, of course, the  
5 landlord would say when we're in ongoing discussions with  
6 Sears and among other -- prior to the bankruptcy and among  
7 other things, they ask us to delay some of the work and  
8 they're aware that we're doing the work and saying we're  
9 going to get reimbursed, that "timely" was certainly after  
10 April 1 is understood to still be outstanding 'cause they'd  
11 finish the work if they had access to the premises right  
12 now. But Sears was nonresponsive.

13 MR. WEAVER: Your Honor, if I --

14 THE COURT: Well, so I think that frames the  
15 issue. So that's what I'd like you to address. Those  
16 arguments which you probably weren't going to address but I  
17 wanted to go through the --

18 MR. WEAVER: I'm going to cut right to the chase.

19 THE COURT: -- facts first --

20 MR. WEAVER: Fair enough. No problem, Your Honor.

21 THE COURT: -- to get to that area of  
22 disagreement --

23 MR. WEAVER: Right.

24 THE COURT: -- on the return of the money in the  
25 account.

1 MR. WEAVER: Right. Well, Your Honor, if I may, I  
2 think -- first of all, the only evidence we have to talk  
3 about, really, the true evidence, is this one e-mail. I  
4 want to talk about that e-mail, about what the request was.  
5 I think it all relates, Your Honor, because when we go  
6 through that e-mail, there was a discussion about doing --  
7 the deadline had passed. April 1st had passed and they had  
8 not met their deadline. But the tenant made a decision  
9 under the assumption that the seismic work was about to get  
10 started that they should do it together. And the tenant can  
11 keep that decision and optionality, Your Honor. And it's  
12 provided for specifically in the agreement. This is  
13 something I think we have to look at. We can't look at this  
14 provision in isolation. We have to also look on the page  
15 previous on paragraph 23 of the amendment, Your Honor. And  
16 that is the extension of time express waiver provision.

17 And that provides: "The parties hereto may, only  
18 by an instrument in writing, extend the time for or waive  
19 the performance of any obligation of the parties hereto."

20 And I think the important language is: "Failure  
21 on the part of either of the parties to enforce any rights  
22 which they may have against the other for the other's breach  
23 of this [Agreement] shall not constitute a waiver of the  
24 said right, nor shall any written waiver given by a party  
25 pursuant [t]hereto be deemed to constitute a waiver of any

1 other right not expressly waived therein."

2 Your Honor, that language has to be read with this  
3 provision.

4 Now, as a practical matter, Your Honor, as a  
5 tenant and a landlord, do they have to work these things  
6 out? Does the tenant want this work to happen? Absolutely,  
7 Your Honor. But we're here about a cure objection, about a  
8 default under the agreement. And when you take that  
9 language with the provision, I think it, frankly, takes away  
10 a lot of the factual discussion that we have to have. It's  
11 not in dispute that the work wasn't done. It is in --  
12 they've raised a course of conduct, Your Honor. But the  
13 California case law they cite is clear, course of conduct  
14 cannot contradict the express terms and they can't get  
15 around paragraph 23, Your Honor. They just can't.

16 THE COURT: Well, let me lay something out to you.

17 MR. WEAVER: Sure, Your Honor.

18 THE COURT: I understand that there's a deadline  
19 in the first sentence. And it talks about the funds being  
20 released to the tenant at tenant's election. There's no  
21 formal election. But the tenant had the funds already.

22 MR. WEAVER: They wouldn't have to elect because  
23 it wasn't with escrow, Your Honor.

24 THE COURT: Right. So the tenant then, it appears  
25 to me, did, in fact, cause the work to be completed. It

1 used --

2 MR. WEAVER: It -- I was coming to that point,  
3 Your Honor.

4 THE COURT: It used the landlord's subcontractors  
5 to do that through the landlord and perhaps argue --  
6 although the record is -- really doesn't support this --  
7 perhaps it spent of its own money, too.

8 I believe what you're saying is that that's fine.  
9 That's why it did what it did. And then -- but that doesn't  
10 change the operation of the second sentence which says that  
11 you got to complete it in a timely manner as a condition to  
12 getting the money back.

13 MR. WEAVER: If you rely upon that provision, yes,  
14 Your Honor.

15 THE COURT: Right.

16 MR. WEAVER: As you --

17 THE COURT: Well, that's the provision that says  
18 the money comes back.

19 MR. WEAVER: Correct, Your Honor. But as you just  
20 outlined --

21 THE COURT: 'Cause there was no formal election.

22 MR. WEAVER: Correct. But as you just outlined,  
23 Your Honor, they had the option to use the landlord work.  
24 They had that option. And that wouldn't be -- they wouldn't  
25 be entitled to return the funds if they elected to go that

1 route. The reason you have paragraph 23, Your Honor, is so  
2 the tenant can make its decision that things are most  
3 economical. And it would be one thing, Your Honor, if they  
4 had any backup for this one-page invoice that they've  
5 submitted. Then maybe we could even talk about it. But we  
6 have nothing. Your Honor, we literally have nothing other  
7 than one page. And --

8 THE COURT: Well, can we go to that?

9 MR. WEAVER: We can. And their deadline, Your  
10 Honor, was May 1st.

11 THE COURT: I guess this is -- I'm a little  
12 confused about this. Is the -- this is as much a question  
13 for you as counsel for Transform.

14 Is the claim by the landlord for, you know, in  
15 excess of a million dollars based on this deposit? Is it  
16 premised on work it did or that it paid for that hasn't yet  
17 been paid? That's one.

18 Or is it simply for the return of the remaining  
19 amount of the deposit because it didn't actually have to pay  
20 for the work beyond what it's already been paid for and  
21 therefore, it's entitled to a refund?

22 Which one of those two is it?

23 MR. KUPETZ: It's both.

24 THE COURT: It's both.

25 MR. KUPETZ: There's 322 --

1 THE COURT: You can stand up. I know in  
2 California they do it differently but in New York --

3 MR. KUPETZ: I'm sorry.

4 THE COURT: -- they stand up.

5 MR. KUPETZ: I'm sorry, Your Honor. Should I go  
6 to the --

7 THE COURT: No, no. The microphone will pick you  
8 up. It's just that they (indiscernible). Okay.

9 MR. KUPETZ: The 322,000 is for work that's been  
10 done and hasn't been paid for.

11 THE COURT: Okay.

12 MR. KUPETZ: There would then be additional work  
13 that the landlord is prepared to do to finish completely  
14 that the landlord estimates at 375,000. Completely. And  
15 that would leave approximately 727,000. The landlord's  
16 view, as set forth in the declaration, is that the deposit  
17 was always set up with an intended buffer --

18 THE COURT: Right.

19 MR. KUPETZ: -- in there.

20 THE COURT: Okay. So do you agree with that that  
21 there's an amount that it's claimed 322,000 that's been done  
22 and not paid -- for work that's been done and not paid for  
23 and the rest is just for the return of the  
24 overcollateralization?

25 MR. WEAVER: I agree, Your Honor, that their --



1 THE COURT: That's their claim.

2 MR. WEAVER: -- their objection was --

3 THE COURT: All right.

4 MR. WEAVER: -- 322 for work done, return of the  
5 rest.

6 THE COURT: So as far as the 322 --

7 MR. WEAVER: Yes.

8 THE COURT: -- I believe you're contending that  
9 the bill just doesn't support -- there's no backup for that  
10 bill except for a relatively small amount?

11 MR. WEAVER: Well, I have -- well, I have two  
12 arguments. As a fundamental evidentiary matter, yes, Your  
13 Honor. When they submitted their cure objection on May 1st,  
14 they submitted a one-page invoice with nothing else.

15 THE COURT: Right.

16 MR. WEAVER: Today we're now a few months later.  
17 There's still nothing else for that invoice. Nothing. So  
18 that's what we have.

19 But it's a technical reading in the agreement,  
20 Your Honor, but I think it's the correct reading, which is  
21 to the extent the tenant decided to use -- to do this, how  
22 did the landlord do this work. It's no longer operating  
23 under the provision of Section (d). If they want to claim  
24 they've done work and they haven't been paid for it, Your  
25 Honor, it's not a breach of this provision, it's not a

1 breach of this agreement. It's -- the tenant has elected to  
2 complete the work itself. And it may be using them. But  
3 it's not a breach of --

4 THE COURT: But it would have to pay for it.

5 MR. WEAVER: Correct, Your Honor. And they could  
6 bring a breach action. But it's not a cure --

7 THE COURT: All right.

8 MR. WEAVER: -- under this lease, Your Honor.  
9 That's what we're arguing.

10 THE COURT: Okay.

11 MR. WEAVER: This is not a proper --

12 THE COURT: All right.

13 MR. WEAVER: -- cure objection.

14 THE COURT: I understand that point.

15 MR. WEAVER: Okay.

16 THE COURT: All right.

17 MR. WEAVER: If there's nothing else on that, Your  
18 Honor, I'll move on.

19 Again, though, emphasize -- well, I don't want to  
20 move on, Your Honor. I'm sorry. I feel like I do have to  
21 address it.

22 You know, the course of conduct that they want to  
23 rely upon here, Your Honor, again, we really -- in the  
24 record, we have one --

25 THE COURT: Can -- I'm sorry to interrupt you.

1 MR. WEAVER: No. Of course.

2 THE COURT: But it actually -- and I don't want to  
3 get you in trouble with your client but I think this -- and  
4 I actually think what you said was the correct legal  
5 response. But --

6 MR. WEAVER: Thank you, Your Honor.

7 THE COURT: -- I just want to point out to the  
8 landlord that if the 322,000 were a cure objection, it  
9 wouldn't be sustained on this record. What counsel just  
10 said is, it's not a cure objection. It's a right either  
11 under quantum meruit or based on the parties' actual  
12 dealings with each other as to the work that was done post-  
13 April 1. So it preserves the right to get paid for that  
14 which if it were a cure objection, you probably have --  
15 well, you haven't sustained unless you can show me the  
16 backup. But go ahead.

17 MR. WEAVER: Well, in that case, Your Honor, I'm  
18 going to not deal with course of conduct unless --

19 THE COURT: Right.

20 MR. WEAVER: -- you want to hear more about it  
21 later, Your Honor. I -- for efficiency purposes, I'm happy  
22 to move on to the seismic --

23 THE COURT: Well, I mean -- why don't you cover  
24 it?

25 MR. WEAVER: Okay.

1 THE COURT: I mean, the parties have addressed it  
2 in their papers. So --

3 MR. WEAVER: They have, Your Honor. I just think  
4 that it's really important that the language of paragraph 23  
5 -- because course of conduct -- first of all, I don't think  
6 we have course of conduct here. But even if there was a  
7 course of conduct, you cannot go contrary to an express  
8 provision. You can't. California law is clear on that.  
9 The cases they cite are clear on that, Your Honor. You  
10 can't go against an express provision. 23 is express.

11 THE COURT: Which is the no-waiver provision.

12 MR. WEAVER: No-waiver provision. The fact that  
13 we don't enforce our right on April 2nd doesn't mean we've  
14 waived it. That's -- I should say the tenant's right, Your  
15 Honor.

16 THE COURT: It could go to explain the word  
17 "timely".

18 MR. WEAVER: It could, Your Honor.

19 THE COURT: But --

20 MR. WEAVER: It could, Your Honor. And if we want  
21 to limit it to that, Your Honor, I'm very happy to look at  
22 the e-mail from May 11th.

23 THE COURT: Right.

24 MR. WEAVER: This is Landlord Exhibit 5. And this  
25 is the e-mail from Dolores -- and no one can pronounce her

1 last name, Your Honor so we keep calling her Dolores. So I  
2 apologize for that.

3 THE COURT: Okay.

4 MR. WEAVER: And in the discussion -- and again,  
5 this is after the deadline has passed. She acknowledges the  
6 deadline has passed and says, in light of that, what we'd  
7 like you to do, we're making the decision, we want you to do  
8 this with the seismic work because that's more efficient for  
9 us. And there's an assumption belongs to that. The  
10 assumption is the seismic work's about to get started.  
11 We're going to pull the permits that year; we're going to  
12 start in January 2018.

13 The record's clear, Your Honor. They didn't pull  
14 the permits of this year. So the idea of "timely", Your  
15 Honor, the course of conduct there is irrelevant. There was  
16 a discussion about doing the work together. But that --  
17 even deciding to make that offer doesn't waive their rights  
18 under the provision.

19 THE COURT: And, in fact, it really wasn't done  
20 together, right?

21 MR. WEAVER: It hasn't been done. The seismic  
22 work hasn't been done at all.

23 THE COURT: No, no. The HVAC work was done  
24 separately. It wasn't timed to the seismic work.

25 MR. WEAVER: Apparently. Correct. Correct, Your

1 Honor. Correct, Your Honor.

2 And then the other e-mails, Your Honor, just to  
3 touch on them briefly, they're frankly all about having  
4 meetings in Los Angeles amongst landlord and tenant. If you  
5 look at Landlord's Exhibit 6, there's this discussion we've  
6 talked about. There's talk about landscaping and building  
7 security, pulling aside the permits. Exhibit 7, Your Honor,  
8 frankly, is the same communication that was in Exhibit 12 so  
9 they've repeated themselves.

10 Exhibit 14 has to do more about meetings. Exhibit  
11 -- I'm sorry -- Exhibit 8. Exhibit 9, more about meetings.

12 THE COURT: I'm sorry. When you're referring to  
13 these exhibits, these are the exhibits in the witness  
14 binder?

15 MR. WEAVER: No, no. The landlord exhibits. I'm  
16 sorry, Your Honor. The landlord exhibits. I can --

17 THE COURT: Fine.

18 MR. WEAVER: We didn't catch them all.

19 But the point is, Your Honor, the discussion in  
20 the e-mails that's relevant here is this discussion about  
21 doing the seismic work together. That's the only discussion  
22 that's relevant. And I would argue, Your Honor, that the  
23 only course of conduct that's been demonstrated today is  
24 that the landlord took forever to bill the tenant. They  
25 submit -- they want to argue because the tenant paid them

1 after the deadline that that somehow indicates their  
2 acquiescence. But they didn't even bill them until after  
3 the deadline, Your Honor. And we looked at the invoices  
4 today. Almost all of the invoices are before the deadline.  
5 But the ultimate invoices to Sears came after the deadline.  
6 So that's the course of conduct. They bill late and they  
7 were paid.

8 THE COURT: Well, bill late for services when?

9 MR. WEAVER: Before April 1st except for the 14  
10 invoices that we've identified. And many of them are from  
11 the month of April 2017, Your Honor. That's what the record  
12 provides.

13 (Pause)

14 THE COURT: Okay.

15 MR. WEAVER: Then, Your Honor, turning then to the  
16 seismic retrofit issue, Your Honor, here we look to first  
17 Joint Exhibit number 1, which is the 2011 lease. So at  
18 paragraph 2(a)(3), Your Honor, it says that, "Without  
19 tenant's prior approval, which may be withheld for any or no  
20 reason in its sole discretion, Landlord shall not construct  
21 or install any improvements or make any changes to Tenant's  
22 Control Area or interfere with or obstruct Tenant's use  
23 thereof in any manner whatsoever."

24 Now the point of that section, Your Honor, isn't  
25 to argue that Sears can simply put their head in the sand

1 and say you can't do any work. But that's the starting  
2 point. That is where we start from. And from there, we  
3 then move to the 2015 amendment, Your Honor.

4 So if we go to Joint Exhibit 2, which is the 2015  
5 amendment, Your Honor, you already identified yourself that  
6 paragraph 2 lays out at the beginning that the landlord  
7 shall be responsible for the costs and expense related to  
8 these projects. And if we go to paragraph 8, Your Honor,  
9 which is the seismic work paragraph, again, it makes clear  
10 the landlord's responsible for all of the seismic repairs.  
11 They're to pull the permits within 12 months of when LA  
12 approves. They're then also to complete the work within 12  
13 months after pulling the permits.

14 It also provides in that section, Your Honor, that  
15 "The plans and specifications, schedule, authorized hour of  
16 construction activity and remediation plan for said seismic  
17 work shall be pre-approved by Tenant pursuant to Demolition  
18 and Construction Protocol attached hereto as Exhibit C, and  
19 conducted in a manner that creates the minimal possible  
20 visual and noise inconvenience to Tenant and its customers."

21 So that's the work, Your Honor, that needs to be  
22 done and how it needs to be done.

23 So to look at Exhibit C, Your Honor, to this  
24 agreement which is --

25 THE COURT: The construction protocol.



1 MR. WEAVER: Yeah. And that is found -- if you  
2 look at the ECF pages at the top, I think it's page 48 of  
3 135.

4 THE COURT: Right.

5 MR. WEAVER: And here, Your Honor, we're dealing  
6 with paragraph 2(b) which is the non-hazardous materials.

7 THE COURT: Right.

8 MR. WEAVER: So it says, "Landlord shall provide  
9 two weeks notice." And it states that such notice "shall  
10 include the scope of work contemplated, a detailed set of  
11 plans and specifications for the same together with a  
12 schedule, authorized hours of construction activity and  
13 remediation plan for the same". And this provides that if  
14 the tenant doesn't respond in 10 days, that's considered to  
15 be approval of those plans.

16 So, Your Honor, the landlord simply did not meet  
17 their obligation under the agreement. So there's nothing to  
18 be arguing that there was any breach under the 2015  
19 amendment, Your Honor. The thing they point to is Joint  
20 Exhibit number 3 which is September 25th letter. And, Your  
21 Honor, that letter does not have any detailed plans, no  
22 floor plans, no specifications. The testimony's been that  
23 it was a negotiating document, Your Honor. The idea was  
24 there'd be a back-and-forth. The only timeline included in  
25 that was that Sears would shut down for six months. And,

1 Your Honor, I could point to all the provisions in the two  
2 contracts that make very clear that it was important that  
3 the store continue to operate. And the idea that Sears  
4 would shut down particularly on the eve of bankruptcy for  
5 six months, there's no offer of compensation for that, Your  
6 Honor, frankly, is absurd. It may have been a condition of  
7 the construction financing they were looking for but that's  
8 not on the tenant, Your Honor. The landlord assumed all the  
9 risks for the costs for this project.

10 And importantly, Your Honor, the person to whom  
11 that letter was addressed responded. And this is Joint  
12 Exhibit 11, Your Honor. And I don't need to read the entire  
13 paragraph to you again, Your Honor, but it's clear in that  
14 response not only that this was not what the parties had  
15 been talking about but that there were concerns on the side  
16 of the tenant about missing deadlines and that they stated  
17 just two months prior that they may not go forward with the  
18 project, Your Honor. That was the response.

19 And the response further was an offer from counsel  
20 to meet with the lawyer. Now we heard a lot on the stand  
21 today about verbal conversations, Your Honor. But to the  
22 extent anyone thinks something in writing is inconsistent  
23 with the facts, usually they respond in writing to keep the  
24 record clear. And there's no written response to counsel's  
25 communication, Your Honor. There's none. And I think that

1 speaks volumes, Your Honor.

2           So they want to invoke, Your Honor, the covenant  
3 of good faith and fair dealing. They don't want us to point  
4 to any provision of the agreement that was in default. They  
5 want to apply an obligation onto the tenant. But the law,  
6 Your Honor, again, here in California and everywhere is  
7 clear. You cannot invoke the covenant of good faith and  
8 fair dealing to contradict express terms of the contract.  
9 And I think, Your Honor, just the case that we cite, the  
10 Storek case -- Storek & Storek case in our papers, cites to  
11 the California Supreme Court and says very clearly the scope  
12 of conduct prohibited by the covenant of good faith is  
13 circumscribed by the purpose and express terms of the  
14 contract.

15           We're aware of no reported case in which a Court  
16 has held that the covenant of good faith may be read to  
17 prohibit a party from doing that which is expressly  
18 permitted by an agreement.

19           On the contrary, the general matter implied terms  
20 should have to be read "shall never be read to vary express  
21 terms". What are the express terms here, Your Honor? The  
22 tenant has complete autonomy over its space. There's no  
23 question about that. And the landlord has an obligation to  
24 develop the plan -- a plan -- that's minimally invasive.  
25 That's on the landlord, Your Honor. And there's a provision

1 with the agreement that says how you do that. It's the  
2 construction protocol. It's cited within Section 8.

3 The landlord's one and only proposal, Your Honor,  
4 is the September letter which was an ask that Sears shut  
5 down for six months. Now even assuming that the landlord's  
6 argument to be true that there was no formal response on  
7 Sear's letterhead, Your Honor -- and I think the Sears'  
8 counsel's response speaks volumes -- they didn't get  
9 anywhere near to meet their obligations under the protocol.  
10 And if they can't meet their obligations, they cannot then  
11 somehow create an obligation not even in the contract for  
12 the tenant. Yes, Your Honor, Sears went into bankruptcy in  
13 October. No one in this room is more familiar with how busy  
14 and crazy that was, Your Honor. But that does not give them  
15 a hook to try to argue that their failure to do anything  
16 under the contract provides a burden on the tenant.

17 And more importantly, Your Honor, the idea that  
18 they were ready, willing and able to do this, the contract,  
19 the amendment, was signed at the end of 2015. The testimony  
20 in the deposition record, Your Honor, is that the landlord  
21 didn't even begin to look for construction financing until  
22 June of 2018. They didn't pull the permits until February  
23 2019. Your Honor, if this project doesn't go forward, it's  
24 not because they didn't get a letter back on Sears'  
25 letterhead that says we're not shutting for six months, Your

1 Honor.

2 The landlord can't use its lack of prosecuting the  
3 program as a way to try to recover these costs because Sears  
4 went into bankruptcy.

5 And I think overarching all of this, Your Honor,  
6 is the idea that these are just speculative damages. They  
7 are. They're speculative. We've talked about the  
8 construction advance. And Your Honor's already said that --  
9 I think made clear your view, but I would just state that  
10 how can we argue about the return of a construction estimate  
11 deposit and the work's not done? We can't. There's -- we  
12 can't. Who knows what may happen? Maybe they do some more  
13 work and there's a pipe burst and there's more dam -- we  
14 don't know, Your Honor. We can't return money until the  
15 work is done. And they admit the work is not done. And as  
16 you've already held, on the basis of the record, they  
17 certainly have not supported their claim for \$322,000.

18 But as it relates to the seismic retrofit, Your  
19 Honor, the permits are active; they're valid. They're  
20 active today. You heard testimony from the landlord that  
21 they have control over 30 percent of the ground floor. You  
22 also heard testimony today that all they have to do is begin  
23 construction and call an inspector. That's all. That was  
24 in the deposition and it was repeated today. That's what  
25 they have to do to keep those entitlements going. So if

1 Your Honor, for example, will rule today in their favor and  
2 provide for a ruling, and Transform then took the lease and  
3 made that payment, nothing would stop them, Your Honor, from  
4 beginning construction on the 30 percent that they own the  
5 next day. And then those entitlements would still be valid.

6 THE COURT: Is there -- I saw easements from the  
7 landlord to Sears in the lease. Is there any issue as to  
8 access to the 30 percent to start construction is more of  
9 the question for -- no. For counsel.

10 MR. WEAVER: Certainly not in the record, Your  
11 Honor. I don't believe there is. Actually, I did ask the  
12 question on the stand, Your Honor, and the only issue was  
13 financing. That was the witness' testimony.

14 THE COURT: That's true.

15 MR. WEAVER: So, Your Honor, I don't see how you  
16 can satisfy, I think, legal arguments which are very -- I  
17 think, Your Honor, are very strong and I hope you agree.  
18 But how in the world -- and particularly, Your Honor, their  
19 deadline for cure objection was May 1st. That was the  
20 deadline of their cure objection. And there's nothing in  
21 their cure objection about the fact the project is dead.  
22 They've lost a --

23 THE COURT: Well, they reserved their rights to  
24 supplement it.

25 MR. WEAVER: They did, Your Honor.

1 THE COURT: And they supplemented it within two  
2 days before the final deadline. So --

3 MR. WEAVER: Correct, Your Honor. Fair enough.

4 So, Your Honor, happy to answer any more questions  
5 you may have. But that is the argument that I'm trying to  
6 present to Your Honor this morning.

7 THE COURT: Okay.

8 MR. SHOMOF: Can I stand?

9 MR. KUPETZ: Your Honor --

10 THE COURT: No. Only the lawyers get to speak.

11 MR. SHOMOF: No? Okay.

12 THE COURT: You could whisper something to him now  
13 if you want him to think about something.

14 (Pause)

15 MR. KUPETZ: Your Honor, I would indicate that  
16 while counsel said they had tried to resolve consensually  
17 cure objections, we just didn't have any discussions in  
18 terms of whether it was with Sears or Transform, there were  
19 no substantive discussions once the filing occurred although  
20 we reached out.

21 With respect to the construction estimate deposit,  
22 Transform incorrectly contends that the landlord has  
23 forfeited its right to that deposit. The landlord deposited  
24 \$3,250,000 with Sears. The understanding was and is that  
25 that was strictly to be used for reimbursement of specified

1 tenant improvement construction expenses. So the evidence  
2 shows --

3 THE COURT: But where is that in the agreement?

4 MR. KUPETZ: Well, even when you look at the  
5 agreement, Your Honor, there's nothing that says --

6 (Pause)

7 MR. KUPETZ: Even in Section 25(d), Your Honor, it  
8 doesn't say what happens to the deposit if the work isn't  
9 completed. It doesn't say that it's forfeited to Sears.

10 THE COURT: Well, it says that the -- the second  
11 sentence says that any remaining construction estimate  
12 deposit shall be dispersed to the landlord if the landlord  
13 has done it. But --

14 MR. KUPETZ: Right. I'm saying if it's done, they  
15 have to disburse it to the landlord.

16 THE COURT: Well --

17 MR. KUPETZ: But it doesn't say that if it's not  
18 done, Sears -- and Sears doesn't spend the money to do the  
19 work, that they somehow get to keep the money and have some  
20 kind of windfall.

21 THE COURT: Well, they have the money.

22 MR. KUPETZ: Right. Of course, the agreement  
23 didn't contemplate that specifically and the parties  
24 modified that approach. But it was --

25 THE COURT: I mean, I can understand an argument,



1       although this wouldn't be a cure argument, that keeping the  
2       deposit and not using it to complete the construction might  
3       be an unenforceable penalty, something like that, or  
4       unenforceable liquidated damages. But that's not really a  
5       cure issue. I mean, that's how you'd normally deal with  
6       forfeit.

7               MR. KUPETZ: Right. But the agreement granted, in  
8       terms of the way it's written, has some ambiguities is what  
9       we would say. But it doesn't -- it's not saying that this  
10      deposit is forfeited --

11             THE COURT: Well --

12             MR. KUPETZ: -- if this work isn't done.  
13      Certainly, as set forth in the witness' direct testimony,  
14      the declaration, the understanding certainly of the landlord  
15      was that these funds were to be strictly used for the  
16      specified work.

17             THE COURT: Well, it says that this is -- 25, the  
18      introductory paragraph, describes the 3.25 million deposit  
19      as "to partially secure Landlord's design, repair,  
20      construction and completion obligations under this  
21      Amendment" which includes not only the four paragraphs but  
22      the whole thing including the seismic. So --

23             MR. KUPETZ: Well --

24             THE COURT: You know, it's securing it, all that  
25      work. That work -- it's clear the seismic work hasn't been

1 done yet. So --

2 MR. KUPETZ: Right. But --

3 THE COURT: -- to say that he would go back  
4 because it's a forfeiture seems to be contradictory to its  
5 purpose which is to secure the deposit.

6 MR. KUPETZ: I don't think that's really what it  
7 says because --

8 THE COURT: I just read it to you.

9 MR. KUPETZ: No. But --

10 THE COURT: That's exactly what it says. That's a  
11 quote. That's the purpose of the deposit.

12 MR. KUPETZ: But then --

13 THE COURT: It's a separate point you're making --

14 MR. KUPETZ: Okay.

15 THE COURT: -- I think, which is that it's unfair  
16 for the landlord to say that because their work in 3, 4, 5,  
17 6 and 7 isn't timely done that they get to keep the deposit  
18 and they can do with it whatever they want to. But that's  
19 not a cure issue. That's potentially a liquidated damages  
20 issue. But clearly, it seems to me if they apply it to the  
21 work that should have been done and hasn't been done which  
22 includes 8, then there's no forfeiture. It secured all that  
23 work.

24 MR. KUPETZ: But 8 isn't covered by 25(d).

25 THE COURT: No. I know. But you're saying that

1 the landlord has a claim to the deposit. And we're not  
2 talking about the 322,000. We're talking about a claim to  
3 the deposit. And that's just not -- anyway, why would the  
4 landlord be entitled to it unless there was some sort of  
5 agreement that the deadline was waived.

6 MR. KUPETZ: Well, and that's certainly the  
7 landlord's --

8 THE COURT: I understand that.

9 MR. KUPETZ: And I can discuss that --

10 THE COURT: That's a separate point.

11 MR. KUPETZ: That's --

12 THE COURT: But when you're talking about  
13 forfeiture, it's a different issue.

14 MR. KUPETZ: Yeah. But that is the landlord's  
15 position that --

16 THE COURT: I understand.

17 MR. KUPETZ: -- the deadline was waived.

18 THE COURT: Right.

19 MR. KUPETZ: And it's the landlord's position that  
20 upon completion of the work, which the landlord is prepared  
21 to do, the remainder of the deposit is to be returned to the  
22 landlord.

23 THE COURT: Right.

24 MR. KUPETZ: Your Honor, in the direct testimony  
25 of Mr. Shomof, it's stated that prior to the commencement of

1 the case, Sears communicated with the landlord on a regular  
2 and continual basis. It wasn't just by e-mail. It's  
3 e-mail, telephone, in-person meetings -- to coordinate and  
4 request that the landlord do construction work at the  
5 premises for which the landlord was and/or would be  
6 reimbursed from this deposit. This occurred after the April  
7 1 deadline. The testimony shows that, and states, in  
8 reliance on tenant's representations and the requests and  
9 the conduct and the performance, the landlord performed this  
10 work at the premises --

11 THE COURT: So you're saying it is a cure  
12 objection knowing what I've already told you that you don't  
13 have proof of the 322,000?

14 MR. KUPETZ: No. Well, we're saying we have a  
15 legitimate claim to get paid.

16 THE COURT: But you haven't given me a backup for  
17 the amount.

18 MR. KUPETZ: Well, they're all -- there isn't  
19 evidence that that amount wasn't incurred. I mean, the  
20 amount has been stated the landlord --

21 THE COURT: That's not how you prove a claim.

22 MR. KUPETZ: Well, the landlord's testified that  
23 this was incurred.

24 THE COURT: He hasn't reviewed any of the  
25 underlying documents. He doesn't know the invoices. He

1 didn't attach the invoices to his declaration.

2 MR. KUPETZ: Well, you're referring to the 322?

3 THE COURT: Yeah.

4 MR. KUPETZ: He attached the invoice presented to  
5 Sears.

6 THE COURT: But nothing to support it. It may  
7 well be that he could do that but he hasn't as far as a cure  
8 claim to me today.

9 MR. KUPETZ: No. His testimony talks about the  
10 point person at Sears, as counsel's referred to, or Dolores.  
11 Obviously, her e-mails -- they went back and forth. They  
12 continued to be involved. She was going to legal. She did  
13 talk to legal. In our view, waived any deadline. That was  
14 the understanding.

15 THE COURT: How is that a waiver, that e-mail?

16 MR. KUPETZ: Well, it's not -- we're not trying to  
17 rely just on that e-mail but that e-mail and other conduct  
18 including other e-mails that showed that work was being done  
19 and that she, on behalf of Sears, was in approval of that  
20 work and ongoing work. Shows a course of performance that,  
21 under California law, does supplement and does qualify and  
22 can modify contrary terms in a contract. And that's what  
23 occurred here.

24 In the legal discussion, they included it, pages 5  
25 through 7 of the reply, if you go through that, there's the

1 California Civil Code provision that talks about it and then  
2 cites to the commercial code history. And in there, it  
3 talks -- in the quoted language that we have from the  
4 California Court of Appeals decision is the lengthy block  
5 quote that we put at page 6. And there's a reference in the  
6 last paragraph on that page that "Course of performance is  
7 relevant in ascertaining the meaning of the parties'  
8 Agreement and it may supplement or qualify the terms of the  
9 Agreement or show a waiver or modification of any term  
10 inconsistent with the course of performance." And that's  
11 what --

12 THE COURT: But the parties have already stated in  
13 their Agreement that there's a no-waiver -- spelled out how  
14 you waive. It just doesn't -- I don't see that. I don't  
15 see the basis of that point.

16 MR. KUPETZ: Well, Your Honor, I won't belabor it  
17 then but in our papers, and in our view, the parties did  
18 modify by course of performance --

19 THE COURT: Let me just go to the -- this  
20 argument.

21 (Pause)

22 THE COURT: The e-mail from Dolores acknowledges  
23 or states the fact that the deadline was not met. Right?

24 MR. KUPETZ: Right. And she continues on.

25 THE COURT: Right. So wouldn't that, at that

1 point -- wouldn't that point which that's obvious and she  
2 states it, be the point where there's a dispute as to what  
3 happens next?

4 MR. KUPETZ: No. Because they were in agreement  
5 as to what would happen next.

6 THE COURT: But there's a dispute as to how to go  
7 ahead because --

8 MR. KUPETZ: Not with respect to the construction  
9 estimate deposit, where it goes. With respect to the  
10 seismic work and other work, they didn't come to an  
11 agreement. But with --

12 THE COURT: But she just said you missed the  
13 deadline.

14 MR. KUPETZ: Right. But we -- but we're going to  
15 continue to work with you. And there's other e-mails.  
16 Here's what -- that works looks good. Keep doing it. And  
17 they came out and met in person after that, Dolores and  
18 another representative of Sears both in June and November of  
19 that year and, you know, continued to make payments  
20 following that time and to request that work be done on  
21 these elements. It was -- they only didn't finish up the  
22 ultimate work on the construction deposit portion when two  
23 things happened. First, Sears had asked to delay the HVAC.  
24 And they did delay the HVAC --

25 THE COURT: But --

1 MR. KUPETZ: -- work inside the store. They --

2 THE COURT: But she expresses that you've missed  
3 the deadline.

4 MR. KUPETZ: Right, but it's --

5 THE COURT: And now she's --

6 MR. KUPETZ: -- but she then says, "It's fine with  
7 us" --

8 THE COURT: I know, but --

9 MR. KUPETZ: -- "to go forward and" --

10 THE COURT: But that -- my understanding, at  
11 least, of -- any application of this doctrine is precluded  
12 if the parties are already in a dispute, because, in  
13 essence, that would force a party who wants to make the best  
14 of a bad situation to somehow have acquiesced in -- you  
15 don't want to be deemed to have acquiesced in the breach.  
16 It's antithetical to cover, in other words.

17 MR. KUPETZ: Well, I hear what Your Honor is  
18 saying, but I don't believe that's the way the parties were  
19 dealing with it. She never communicated to them that they  
20 were in a dispute.

21 THE COURT: Well, she just said you -- but she  
22 says in that email, you missed the deadline.

23 MR. KUPETZ: Right. But that's fine. We're going  
24 to continue to work this way.

25 THE COURT: Well, but that's what people do when



1 there's cover. You know, it doesn't mean that you've waived  
2 a breach. You could -- particularly with an agreement like  
3 this that, in essence, gives the tenant a backup, which is  
4 to direct the work yourself. Why isn't that what she was  
5 doing?

6 MR. KUPETZ: Well, that wasn't how the landlord  
7 understood it, but maybe that --

8 THE COURT: Well --

9 MR. KUPETZ: It could be what she was doing.

10 THE COURT: All right. So --

11 MR. KUPETZ: The landlord understood we're not in  
12 dispute. We're continuing to work on this and --

13 THE COURT: Well, I --

14 MR. KUPETZ: -- that basically the terms had been  
15 modified voluntarily by the parties.

16 THE COURT: Okay.

17 MR. KUPETZ: So it sounds like Your Honor has  
18 heard as much as you're -- besides the papers, in  
19 considering --

20 THE COURT: Well, I mean, the papers laid this  
21 out.

22 MR. KUPETZ: Yeah. So I think you've --

23 THE COURT: I think it's clear under California  
24 law that you can use course of dealing to explain or  
25 construe a provision of an agreement beyond parol evidence.

1 MR. KUPETZ: Right, and --

2 THE COURT: And I've -- we've discussed that in  
3 terms of the word timely. But I think that the California  
4 courts are actually quite careful in limiting course of  
5 dealing where there are contradictory provisions in the  
6 agreement, and where there's -- where those provisions have  
7 been breached. At that point, I just -- you know, to read  
8 it to say that if the parties continue to try to work out of  
9 a bad situation, the one party has waved its rights under  
10 the agreement just doesn't -- I think you need more than  
11 that.

12 And it -- let's go to the fundamental point, which  
13 is the proposal that she made was to tie the HVAC work to  
14 the seismic work, so they're all done together. That  
15 actually wasn't done.

16 MR. KUPETZ: Well, it was, in part, because part  
17 of the HVAC work didn't affect -- she was really concerned  
18 with in-store interference. Part of the HVAC work is on the  
19 roof -- that rooftop, and that's been done. That doesn't  
20 affect the store. That wasn't what she was concerned about.  
21 She was concerned about in-store access and interference.  
22 And that work hasn't been completed. That's the remaining  
23 portion --

24 THE COURT: Right.

25 MR. KUPETZ: -- because Sears hasn't allowed

1 access as of this point.

2 THE COURT: But the agreement, if you're saying  
3 there was a waiver, was to do it in connection with the  
4 seismic work, so you wouldn't have to do it twice, right?  
5 And --

6 MR. KUPETZ: Well, it was beyond that --

7 THE COURT: -- your argument is, "Well, Sears is  
8 preventing us from finishing the HVAC work, and then we'll  
9 do the seismic work."

10 MR. KUPETZ: But the agreement, as the landlord  
11 understood it, covered other work that was ongoing. It  
12 wasn't just that work, and there's even --

13 THE COURT: We're really talking about two  
14 different things. We're talking about the right to get paid  
15 for the work that was done. Okay?

16 MR. KUPETZ: Right.

17 THE COURT: I think we have an acknowledgment from  
18 the tenant that it's fair to get paid for the work that's  
19 done. It's just not under the terms of this contract, but  
20 still work that was done. On the other hand, to say that  
21 one has a right to the return of the deposit, when the  
22 remaining work hasn't been done, is a real stretch. If  
23 you're relying upon one email in May of 2017 that says,  
24 "We'd like to have the HVAC work done with the seismic  
25 work," and in fact, the HVAC work hasn't been done yet.

1 MR. KUPETZ: Well --

2 THE COURT: And the seismic work, it doesn't look  
3 like it's going to be done, ever, as far as I can tell.

4 MR. KUPETZ: Right.

5 THE COURT: Certainly not within the timeframes  
6 contemplated by paragraph 8. So her -- even if you take her  
7 email as a waiver, which I don't, the conditions of the  
8 waiver haven't been satisfied.

9 MR. KUPETZ: Right. But the landlord also isn't  
10 saying, and as I read our papers and as we presented them,  
11 isn't saying, "And return the full deposit to us that  
12 remains right now." It's saying --

13 THE COURT: That's what their claim is, it's for  
14 the full amount.

15 MR. KUPETZ: Well, we're saying it has to be  
16 maintained. And when we finish the work, which if you give  
17 -- if whoever is the tenant allows access, the landlord can  
18 finish the work.

19 THE COURT: Well, the -- one thing is crystal  
20 clear, to me at least, under the language of 25(d), the  
21 tenant has the right tomorrow to elect to take the deposit.  
22 There's no time limit on the tenant's election.

23 MR. KUPETZ: But it has to be devoted to doing the  
24 work for the property. I don't think they have the right to  
25 just take the deposit --

1 THE COURT: Again, but that's not a cure issue.  
2 That's not a cure issue. They're not proposing to just keep  
3 it? Logically, they apply it to the property, but that's  
4 not a cure issue. But it doesn't say that they have to  
5 segregate it. It just says they take the money. They can  
6 have it.

7 You can argue in the future that it would be a  
8 windfall, or an improper liquidated damages provision, or  
9 putative damages if they don't apply it to the -- finishing  
10 the work, but you know, a) you'd have to win that; and b)  
11 it's not a cure objection today.

12 MR. KUPETZ: And is it a claim against --

13 THE COURT: No, it's not a claim. There's no  
14 claim. They have -- look, I mean, paragraph 25, your  
15 client's main point is that they didn't elect to keep the  
16 money. Well, but they can elect tomorrow. There's no time  
17 limit on it.

18 MR. KUPETZ: But meanwhile, they had the client do  
19 --

20 THE COURT: Well, all right, but that's -- again,  
21 that's not a -- I don't view that -- I view that as they  
22 could've hired, I don't know, some other HVAC person to do  
23 that work. And in fact, the landlord hired an HVAC person,  
24 right? He didn't do the work himself. So yes, you have to  
25 pay for the work you do. I have no idea whether -- what

1 that amount is. It may be considerably less than 322,000.  
2 It may be 322,000. We don't know. But you know, it's hard  
3 for me to imagine that some Court would dispute that if, in  
4 fact, the landlord can show that it paid valid invoices by  
5 people who did valid work, and after it's completed, and  
6 specified, and approved, such approval not to be  
7 unreasonably withheld, they wouldn't be paid for.

8 MR. KUPETZ: But --

9 THE COURT: But that's not a cure objection.

10 MR. KUPETZ: But is that claim against old Sears?

11 THE COURT: No. No. Because it's -- well, I  
12 don't know. That's a good question. That's a very good  
13 question.

14 MR. KUPETZ: Because otherwise, we're allowing a  
15 windfall.

16 THE COURT: Yeah, well, all right. But it may not  
17 be a cure objection. But again, I don't have any proof of  
18 it today. So I think you're better off having it be a cure  
19 objection -- I mean, a quantum meruit claim for the work  
20 that was done.

21 MR. KUPETZ: Does Your Honor want to hear any  
22 other arguments in terms of the failure of the project, or  
23 does the Court want to just --

24 THE COURT: Well, I mean, I don't -- I mean,  
25 that's the step -- that's the other issue. We've been

1 talking about the deposits so far. But as far as the  
2 consequential damages claim for the apparent, or the  
3 asserted inability to get the financing to do the work to  
4 complete the project, it's agreed, right, that there's no  
5 obligation -- express obligation under the contract to  
6 comply with that, right? To do that?

7 MR. KUPETZ: That's correct, Your Honor.

8 THE COURT: So when Mr. Shomof testified that the  
9 financing was pulled because there was a condition that  
10 there be an agreement with Sears, the agreement was the  
11 lease, the 2015 lease. There was an agreement.

12 MR. KUPETZ: Not --

13 THE COURT: Right?

14 MR. KUPETZ: What he was talking about was there  
15 need -- and I can run through this, if it's helpful.

16 THE COURT: Okay. But that's how I'm looking at  
17 it. I mean, it's hard to see --

18 MR. KUPETZ: There needed to be --

19 THE COURT: I'm getting -- I'm ultimately getting  
20 to what I think a business person might understand, which is  
21 I don't -- we could walk through all the terms of the  
22 agreement, but ultimately, if those terms don't permit what  
23 the landlord proposed, it's clear to me that when the bank  
24 put a condition that there be an agreement with Sears, it  
25 meant a new agreement, because the existing agreement didn't

1 provide for it.

2 MR. KUPETZ: Right, they were --

3 THE COURT: And there's no obligation on Sears'  
4 part to provide a new agreement. So I don't see how there  
5 could be any damages for Sears in terms of pulling -- you  
6 know, in terms of the bank financing being pulled. So we  
7 have to look at the agreement.

8 MR. KUPETZ: Well, and we're seeing it's not --  
9 it's really based on an implied covenant of good faith and  
10 fair dealing.

11 THE COURT: Well, I understand. But if the  
12 agreement itself -- the implied terms cannot vary the terms  
13 of the agreement, of the contract. So the part -- I mean,  
14 this contract -- the 2015 contract is very clearly  
15 contemplating this work to be done, and it has a whole  
16 section, the construction protocol. It lays it all out what  
17 needs to be done, as well as the operative paragraphs that  
18 incorporate the protocol.

19 MR. KUPETZ: And in our papers, we tried to  
20 address some of that. I don't know if the Court wants me to  
21 summarize that and go through it.

22 THE COURT: Go ahead. I mean, I don't see how  
23 this letter from September of 2018 came close to satisfying  
24 those conditions.

25 MR. KUPETZ: Well, let me -- maybe -- if the Court



1 will allow, I'll walk through it.

2 THE COURT: Okay.

3 MR. KUPETZ: And hopefully, it advances the cause.

4 THE COURT: Okay.

5 MR. KUPETZ: Prior to Sears entering Chapter 11,  
6 the landlord was in the discussions with Sears regarding  
7 plan rehabilitation and redevelopment of the building.

8 THE COURT: Right.

9 MR. KUPETZ: And that's set forth in paragraphs 39  
10 through 50 of Ms. Shomof's declaration, ECF 4625.

11 THE COURT: Right.

12 MR. KUPETZ: There were communications with Mr.  
13 Velkei, who was one contact, a lawyer out in California that  
14 the landlord had for Sears. There's the letter that the  
15 Court referred to, the 9/25/2018 letter, which did propose  
16 closing the store for six months. That was in the  
17 landlord's -- neither a requirement nor a demand.

18 They didn't get a substantive response refusing  
19 it, and they just couldn't get any engagement from Sears at  
20 all after the Chapter 11 filing. Page 45 -- paragraph 45 in  
21 the Velkei -- or in the Shomof declaration referred to --  
22 talks about how Mr. Velkei advised him to contact Sears  
23 bankruptcy counsel. There was a letter actually from myself  
24 to the Debtor's counsel, which was Joint Exhibit 12.

25 THE COURT: But -- could I interrupt you?

1 MR. KUPETZ: Uh-huh.

2 THE COURT: Because this goes through what's in  
3 your pleadings. And let's assume all of that is true, the  
4 lease amendment has a specific section dealing with seismic  
5 work. It has certain deadlines in it. And then it says,  
6 "The plans and specifications schedule authorized hours of  
7 construction activity and remediation plan for set seismic  
8 work shall be preapproved by tenant, pursuant to the  
9 demolition and construction protocol attached hereto as  
10 Exhibit C, and conducted," that's the next step, "conducted  
11 in a manner that creates the minimum possible visual and  
12 noise inconvenience to tenant and its customers."

13 So then you go to Exhibit C, the demolition and  
14 construction protocol, and 2(b) -- Section 2(b) states,  
15 "Landlord shall provide two weeks' notice for any demolition  
16 or construction work not involving remediation or removal of  
17 hazardous materials of the building parcel, and shall  
18 include in that notice the scope of work contemplated, a  
19 detailed set of plans and specifications for the same,  
20 together with the schedule of authorized hours of  
21 construction activity and remediation plan for the same.  
22 Tenant shall have ten business days from receipt of  
23 landlord's both notice and complete detailed plans of  
24 specifications to provide any comments and/or objections.  
25 No reply from tenant within that period shall constitute

1 approval. Landlord may proceed with the work in question  
2 after complying with the aforesaid procedures, provided the  
3 work in question is approved by tenant or deemed approved by  
4 tenant as aforesaid."

5 And then (c) deals with if tenant lodges timely  
6 objections, "The parties hereto must agree upon the scope  
7 and course of the work, together with the schedule,  
8 authorized hours of construction activity, and remediation  
9 plan for the same before it may proceed. Such consent by  
10 tenant may not be unreasonably withheld."

11 So it appears quite clear to me that A) the  
12 landlord did not provide the type of proposal -- details,  
13 set of plans, specifications, et cetera, that would -- in  
14 the September letter, that would start the ten day clock  
15 ticking. And it may have been, as a business person,  
16 reasonable to assume that he could ignore that and just  
17 discuss things, and try to work from a baseline, which he  
18 knew was clearly unacceptable, to something that would be  
19 acceptable. But that didn't happen.

20 So I think it would then be incumbent upon him  
21 when he wasn't getting any more response than the initial  
22 response he got back, which was arguably a no, although it  
23 was a no to something that didn't really need to be  
24 responded to under this Section 2(b), because it was  
25 responding to something other than a 2(b) type of proposal.

1 But if he wanted to bind Sears in the face of silence, he  
2 had a means to do so. He could make that type of proposal.  
3 And if there was no response within ten days, it's deemed  
4 accepted. The affidavit says that never happened, and it's  
5 not really Sears' fault.

6 MR. KUPETZ: It's correct that didn't happen.  
7 Realistically, as the reply does discuss, it's really an  
8 illusory kind of provision, because --

9 THE COURT: It's a highly detailed provision.

10 MR. KUPETZ: But without --

11 THE COURT: The parties entered into a separate  
12 multi-page -- I mean, a 36 page amendment to their lease,  
13 contemplating all of these things, with then a lengthy  
14 Exhibit C protocol. It couldn't be more detailed. And when  
15 you compare it to the provision in a lease that basically  
16 gives the landlord to terminate for any reason, including  
17 its own financial gain, which the California courts say is  
18 perfectly acceptable and rules out any breach of the implied  
19 covenant of good faith and fair dealing, it's hard to see  
20 how you could somehow say, "Oh, no. The parties did specify  
21 all of this, but we can just make a proposal and then  
22 somehow bind the debtor to having to front all of our  
23 financing and construction costs." This just doesn't really  
24 fly.

25 MR. KUPETZ: But in the real world, as Mr. Velkei

1 said in his response, the very last line of his response.

2 "In order for this project to move forward, there's got to  
3 be collaboration." And there's --

4 THE COURT: In the real world, parties write  
5 agreements that they live up to. This agreement spelled out  
6 what was to happen. If there's a non-cooperating party, you  
7 give it your best shot to comply with the requirements of  
8 2(a). And frankly, at that point, the non-responding party  
9 is at real risk. You know?

10 I mean, if there are details that they could have  
11 negotiated, but the non-responding party, Sears, lets it go,  
12 they're stuck with it. There's an implementation feature.  
13 You know, that's 2(c), but they're stuck. Didn't happen.  
14 You know, it's -- I appreciate business people think  
15 differently sometimes than their agreements, but the  
16 agreements governed, unless they're waived. And there's no  
17 waiver here, this issue.

18 MR. KUPETZ: It sounds like the Court has seen the  
19 papers and doesn't want to hear argument.

20 THE COURT: Yeah. Your papers are pretty clear on  
21 this at this point.

22 MR. KUPETZ: Any other questions, Your Honor?

23 THE COURT: No, I don't think so.

24 MR. KUPETZ: Thank you, Your Honor.

25 THE COURT: Okay.

1 MR. WEAVER: Sorry, Your Honor. I just need to  
2 make clear, and forgive me -- indulge me for one moment.  
3 Just so we're -- I know Your Honor wasn't ruling on this  
4 point, and it's not before Your Honor, but to be clear that  
5 my client, Transform, is responsible for the cure  
6 obligations of any contract that it assumes and assigns --

7 THE COURT: Right.

8 MR. KUPETZ: -- there's not -- that was agreed to  
9 as part of the APA, there's nothing before the Court today,  
10 Your Honor, about any other type of damages that might be  
11 owed to this landlord --

12 THE COURT: No, I agree.

13 MR. WEAVER: -- and who would be responsible for  
14 that.

15 THE COURT: Well, that's fair. But I think, to be  
16 clear, I'm also not authorizing in a ruling here that denies  
17 the landlord's cure objection as to return of the deposit,  
18 that shouldn't be taken to mean that Transform is authorized  
19 to just take that deposit and put it to general uses.

20 MR. WEAVER: Understood, Your Honor. That was not  
21 at all how I understood Your Honor to speak, but I just  
22 wanted to make clear that that Transform's obligations are  
23 limited here, Your Honor, to cure amounts that we're  
24 discussing.

25 THE COURT: That's right.

1 MR. WEAVER: Nothing further from Transform, Your  
2 Honor.

3 THE COURT: Okay. All right. Sears Roebuck was  
4 party to a 2011 lease, which was amended and restated in a  
5 December 30, 2015 lease of an interest in real property  
6 located at 10309 Folsom Boulevard. No, I'm sorry. Is that  
7 the location? Well, let me just say in Los Angeles.

8 MR. WEAVER: Olympic Boulevard, Your Honor.

9 THE COURT: Olympic Boulevard. In Los Angeles.  
10 Consistent with prior orders that I have issued in this  
11 case, Sears sent out a notice of proposed assumption and  
12 assignment of the lease to Transform Holdco. That notice --  
13 that set of notice procedures gave the landlord the  
14 opportunity to object to the assumption and assignment,  
15 and/or to assert that there were outstanding obligations  
16 under the lease, i.e. that there were defaults under the  
17 lease, that created a monetary obligation on behalf of the  
18 tenant to be cured under Section 365 of the Bankruptcy Code.

19 The agreement between Sears and Transform lays out  
20 who's responsible for that cure. But the key point for my  
21 ruling today is that cure is only owed in respect of  
22 monetary obligations for defaults before the assignment of  
23 the lease, including prepetition defaults.

24 The landlord here asserted three sets of defaults,  
25 two of which the assignee, Transform, has agreed are, in

1 fact, properly owed cure amounts, or that will be properly  
2 owed in the case of tax reimbursements, in the amounts  
3 asserted. So there's no remaining dispute between the  
4 landlord and Transform, which under the agreement with  
5 Sears, would be responsible to pay such cure with respect to  
6 the common area maintenance or property tax reimbursement  
7 cure amounts asserted in the landlord's objection.

8 In addition, the landlord's cure objection raised  
9 two other cure issues. And I find that both of the cure  
10 claims or both of those cure claims, although one was  
11 asserted in a supplemental cure claim, were timely made.

12 First, the landlord refers to the remaining  
13 amounts in a so-called construction estimate deposit,  
14 established under Section 25 of the 2015 amended and  
15 restated lease, which was established originally in the  
16 amount of \$3,250,000.

17 And parties agree that substantial amount -- a  
18 substantial amount of that sum has already been paid out of  
19 such deposit. The landlord contends that in respect of work  
20 that it did, or its contractors or subcontractors did, in  
21 the sum of \$322,649.80 is due and owing to the tenant to be  
22 paid from the remaining amount in the construction estimate  
23 deposit.

24 Secondly, it contends that it would be a breach of  
25 the lease if the landlord did not use the remaining amount



1 in the construction estimate -- I'm sorry, if the tenant did  
2 not use the remaining amount in the construction estimate  
3 deposit to reimburse landlord for construction expenses at  
4 the premises, presumably in the future.

5 Secondly, the landlord stated in its original cure  
6 objection that there was an immediate need to make extensive  
7 renovations at the property as part of an overall  
8 rehabilitation plan to develop the property, which is only  
9 70 percent occupied by Sears.

10 And to conclude, work that under paragraph or  
11 Section 8 of the 2015 lease, with respect to seismic work,  
12 needed to be work in a supplemental -- a timely supplemental  
13 objection. The landlord asserted a multi-million dollar  
14 claim based on the alleged breach by the debtor tenant of  
15 its implied covenant of good faith and fair dealing under  
16 the lease, allegedly because the tenant did not reasonably  
17 respond to or cooperate with the landlord in permitting the  
18 landlord to do such work.

19 That multi-million dollar figure was comprised of  
20 cost that the landlord stated it had incurred to lay the  
21 groundwork for that work, and/or the failure allegedly  
22 attributable to the debtor of the landlord's financing to  
23 commence such work.

24 The first set of issues depends upon, in the first  
25 instance, a construction of the 2015 amended and restated

1 lease, which was entered into, as stated in the recitals, in  
2 part because additional work was contemplated on the  
3 building and the -- I'm sorry, the parties "had a number of  
4 issues to dispute," with respect to the terms of the 2011  
5 lease. That prompted the parties to enter into the amended  
6 restatement.

7 The 2011 lease provides in Section 2(a)(3), "The  
8 parties acknowledge that it is most critical to the  
9 successful operation of tenant's business at the premises,  
10 the tenant has access, use, and enjoyment of those portions  
11 of the building parcel shown on the site plan as 'tenants  
12 control the area,'" including such rights as are set forth  
13 below.

14 "Without tenants' prior approval, which may be  
15 withheld for any or no reason in its sole discretion,  
16 landlords shall not construct or install any improvements,  
17 or make any changes to tenants' control area, or interfere  
18 with, or obstruct tenants' use thereof in any manner  
19 whatsoever, including without limitation by reconfiguring  
20 the parking spaces."

21 The 2015 amendment and restatement acknowledges  
22 that additional work will be done and sets forth the  
23 parties' agreement in connection with that work. Section 2  
24 of the document begins with an unlettered paragraph by  
25 stating that, "Landlord at landlord's sole cost and expense

1 shall design, construct, and complete all work contained  
2 within this agreement in compliance with the demolition and  
3 construction protocols attached hereto, and made a part  
4 hereof as Exhibit C, including without limitation, work  
5 described below in Sections 3, 4, 5, 6, 7, 8, 10, and 11,  
6 subject to the terms of Section 9 below, on or before April  
7 1, 2017, unless a different completion date is explicitly  
8 set forth below, in which case the different completion date  
9 set forth below shall govern, or unless the date is  
10 otherwise amended in writing by means of a further amendment  
11 to this agreement.

12 "Final plans and specifications shall be reviewed  
13 and approved by tenant pursuant to the demolition and  
14 construction protocol, even if the work in question is  
15 addressed in the exhibits attached hereto."

16 Paragraphs 3 through 8 and 10 all lay out work  
17 with respect to specific projects. In order: low voltage  
18 service, HVAC, plumbing, façade, signage, seismic work, and  
19 freight elevator work, which are all, as I noted, referenced  
20 in this section that I quoted.

21 The agreement not only has an integration  
22 provision in Section 19, but also has a no waiver provision,  
23 Section 17, which states, "Unless expressly waived or  
24 released in either the building lease, or in this amendment,  
25 or in a separate writing signed by the waiving party, no

1 provision of either the building lease or this amendment  
2 shall be deemed to be a waiver by either party of any rights  
3 or claims against the other, either arising out of the  
4 building lease as amended, or out of any other agreement or  
5 circumstances."

6 It is undisputed that the specific work to be done  
7 or completed under paragraph 2 was not done -- to be done by  
8 April 1st, 2017, was not in fact completed by April 1st,  
9 2017. This is relevant to the claim for the \$322,000, as  
10 well as to the assertion that the money currently being held  
11 as part of the construction estimate deposit needs to remain  
12 to be held in that deposit and paid to the landlord under  
13 the terms of the agreement.

14 Paragraph 25, as I noted, provides for the  
15 establishment of the construction estimate deposit. It is  
16 -- it was funded by the landlord as set forth in that  
17 provision, "To partially secure landlord's design repair  
18 construction and completion obligations under this  
19 amendment," i.e. that landlord's obligation to complete the  
20 work.

21 The agreement went on to establish -- to provide  
22 that tenants shall, in turn, within a reasonable time  
23 thereafter, but in any event within 30 days of landlord's  
24 written request, deposit that money in escrow "to enable  
25 able landlord to be able to draw upon those funds in the

1 construction fund escrow to pay for landlord's design repair  
2 construction and completion work, as required per this  
3 amendment."

4 However, the parties have agreed that the funds  
5 would be held by the landlord. In other words, the escrow  
6 was never set up -- I'm sorry, held by the tenant. In other  
7 words, the escrow was never set up by the tenant and the  
8 landlord never requested the establishment of an escrow.

9 And it is agreed that a substantial amount of  
10 those funds were, in fact, used to pay or reimburse the  
11 landlord for work that it did under Section 2 through 10.  
12 Of particular relevance to the first remaining dispute is  
13 Section 25(d) of the lease, which states, "In the event  
14 landlord does not complete the work contemplated in Sections  
15 3, 4, 6, and 7 by April 1, 2017, the remainder of the funds  
16 in construction escrow shall be released to tenant at  
17 tenant's election, so that tenant can cause the work to be  
18 completed, and tenant shall be entitled to payment by  
19 landlord any additional amounts necessary to complete the  
20 work."

21 Paragraph 25(d) then goes on to state, "Upon  
22 landlord's completion of the work described in Sections 3,  
23 4, 5, 6, and 7 in a timely manner, and its inspection and  
24 acceptance by tenant, any remaining construction and  
25 estimate deposit fund shall be disbursed to landlord,

1 subject to the review and approval of the parties regarding  
2 the amount in question."

3 As I noted, it's undisputed that the work required  
4 by Sections 3, 4, 6, and 7 was not completed by April 1,  
5 2017.

6 It's also disputed that, as of today, the landlord  
7 has not made an election to have the remainder of the funds  
8 released -- I'm sorry -- the tenant has not made an election  
9 to have the remaining funds released to the tenant so that  
10 the tenant can cause the work to be completed.

11 (Pause)

12 THE COURT: There is no time limitation, in the  
13 agreement, on when the tenant may make such an election,  
14 however. So, conceivably, the tenant could make the  
15 election tomorrow given the landlord's failure to complete  
16 the work in Section 346 and 7 by April 1, 2017.

17 The landlord contends, however, that the parties  
18 modified the deadline set forth in the first sentence of  
19 Section 25(d) by its course of dealing or their course of  
20 dealing.

21 The facts to support that contention are two-fold.  
22 First, there are some invoices with backup in the record  
23 showing 14 payments for work done by the landlord after  
24 April 1, 2017, apparently on these -- one or more of these  
25 four projects. Those required to be completed by the

1 landlord under Section 346 and 7 of the 2015 amended and  
2 restated lease.

3 Secondly, there is a May 2017 e-mail from a Sears  
4 real estate employee to the landlord which states or points  
5 out to the landlord that the landlord has not met its  
6 deadline to complete that work by April 1, 2017 and then  
7 goes on to state that Sears would be prepared to have the  
8 remaining A track work done later in tandem with the seismic  
9 work required under paragraph -- or Section 8 of the  
10 agreement to avoid two sets of disruption of Sears's  
11 operations.

12 (Pause)

13 THE COURT: It is reasonably clear to me that  
14 Sears and the landlord were aware of -- that the landlord  
15 continued work after April 1 and that Sears was aware of it.  
16 What we do not have is a signed written waiver as required  
17 by Section 17 of the 2015 amended and restated lease.

18 (Pause)

19 THE COURT: The landlord contends that the cure  
20 claim for the 322,000 and change is not a default under the  
21 lease and it's not being paid out of the construction fund  
22 escrow because of the release feature of the first sentence  
23 of paragraph 25(d) and the fact that the landlord doesn't  
24 have the right to the release of any remaining funds in the  
25 construction fund escrow because there would not a

1 construction fund escrow and/or because the work has not  
2 been completed in a timely manner as required in the second  
3 sentence of that section.

4 I construe the first sentence of Section 25(d) to  
5 provide that the funds in the construction escrow fund could  
6 be released to tenant upon the tenant's election given the  
7 failure to complete the work.

8 The election, in fact, has not occurred but in  
9 equal amount the work was not completed by the dates  
10 required; not only in paragraph 2(d) but also in paragraph  
11 25 and Section 2.

12 (Pause)

13 THE COURT: Given the failure to complete the work  
14 by the time required, I believe that there is no contract  
15 right to its payment.

16 On the other hand, there may be a quantum meruit  
17 right to its payment and there may be well a right as a  
18 quantum meruit matter to be paid out of the construction  
19 fund given paragraph 25's statement that the fund was  
20 required to partially secure the landlord's completion of  
21 the work albeit that it was to be completed under the terms  
22 of the agreement.

23 But it is clear to me that there is no cure claim  
24 per se for the 322,000 because the work was not, in fact,  
25 completed by the time that Section 2(a) requires it to be



1 completed.

2 Again, this doesn't preclude a quantum meruit  
3 claim and it doesn't preclude a claim that the funds that  
4 were held in escrow should be devoted to pay the amount.

5 But, as far as a cure objection is concerned,  
6 there is not cure obligation.

7 There is no present monetary default under the  
8 contract.

9 As pertains to Section 25(d) that leaves the  
10 landlord's other contention which is that there is a breach  
11 of the contract that needs to be cured if the tenant does  
12 not apply the construction estimate deposit to the work, not  
13 only done, but to be done by the landlord under the  
14 agreement.

15 (Pause)

16 THE COURT: I will note that the landlord does not  
17 say that he's entitled to a refund of the remaining deposit  
18 today nor could it because the work has not been completed  
19 as required by the second sentence of paragraph -- or  
20 Section 25(d).

21 The contention as a cure objection really doesn't  
22 apply. It assumes a hypothetical that clearly hasn't  
23 occurred at this point.

24 The landlord must accept that, because it's a  
25 premise of its own argument, that the tenant has not yet

1 elected, under the first sentence of Section 25(d), to have  
2 the construction fund released to it, to the tenant. It is  
3 still, therefore, being held and, as provided in that first  
4 sentence, if such an election is made, it shall be made "so  
5 the tenant can cause the work to be completed to whoever the  
6 tenant chooses to have complete the work."

7 The dispute as to what happens to any residual  
8 amount is not a cure dispute. It's a dispute for the  
9 future. Consequently, that aspect of the landlord's cure  
10 objections also should be denied.

11 (Pause)

12 THE COURT: In summary, then, let me be clear. In  
13 addition to denying both of those aspects of the landlord's  
14 cure objection, the record should be clear that I have not  
15 decided what, if anything, the landlord's entitled to be  
16 paid for work it has already done. It has not set forth  
17 sufficient evidence in the form of backup to support its  
18 invoice of 322,000 for that work. Moreover, it has not  
19 completed the work by the deadlines stated.

20 (Pause)

21 THE COURT: So, I could not, even if there were a  
22 quantum meruit issue before which there isn't since that  
23 would not be an issue under the contract, determine what on  
24 a quantum meruit basis the landlord might be owed.

25 Secondly, I have not determined whether if such a

1 claim is ever fixed the construction fund escrow can be a  
2 source of payment for it. I just noted the possibility as  
3 it may exist either under the introductory paragraph to  
4 Section 25 or the operation of the first sentence of  
5 Section 25(d).

6 The landlord has contended that the May 2017  
7 e-mail and the fact that a relatively small amount of money  
8 was paid for work done after April 1, 2017 by it or its  
9 subcontractors should, as a matter of course of performance  
10 or course of dealing under California law, which the parties  
11 agree controls this dispute as far as contract  
12 interpretation is concerned, meaning that the tenant waived  
13 its rights to completion by April 1 and, therefore, that it  
14 has a cure claim.

15 California generally follows the plain meaning  
16 rule and excludes the admission of parole evidence  
17 particularly for only -- excuse me, but that is the case  
18 here, where there is an integrated written agreement which,  
19 as I noted before, this agreement is.

20 And the parole evidence rule itself can be used  
21 only to resolve an ambiguity in an agreement and this  
22 agreement is not ambiguous as far as the deadlines that it  
23 sets for performance.

24 (Pause)

25 THE COURT: The California courts, however, will,

1 under certain circumstances, permit consideration of the  
2 parties' course of performance of an agreement which is with  
3 respect to a transaction that involves repeated occasions  
4 for performance by a party and the other party with  
5 knowledge of the nature of the performance and an  
6 opportunity for objection to it accepts the performance or  
7 acquiesces in it without objection.

8 Clearly, evidence of a course of performance is  
9 admissible if it does not directly contradict the terms of a  
10 written agreement but merely explains or supplements them.

11 (Pause)

12 THE COURT: A more difficult issue is whether the  
13 course of performance actually permits modification or  
14 alteration of the plain terms of agreement, of an agreement,  
15 if an actual waiver is not shown.

16 And, here, no waiver would be shown given the  
17 express no waiver provision term or the express term  
18 limiting the nature of a waiver in paragraph 17 of the  
19 agreement.

20 (Pause)

21 THE COURT: As far as the deadlines are concerned,  
22 I do not believe that the parties' course of -- the evidence  
23 of the parties' course of performance is sufficient to  
24 overcome the plain terms of the agreement as to when the  
25 work was to be completed.

1           The payment of a relatively small number of post-  
2   April 1 work invoices, or invoices for work done  
3   post-April 1, to me also does not reflect more conceivably  
4   then the tenant causing work to be completed after the  
5   deadline passed which Section 25(d) specifically permits the  
6   tenant to choose any party to use to complete such work,  
7   including, without limitation, the landlord.

8           That leaves the May e-mail which acknowledged the  
9   default to not acquiesce in it but did request, in the light  
10   of the default, completion of the HVAC work in connection  
11   with the seismic work to avoid additional disruption. That  
12   was in May of 2017.

13           The seismic work has yet to start. To me, that is  
14   not sufficient evidence of the course of performance to show  
15   that the parties agreed to waive the April 1 deadline.

16           (Pause)

17           THE COURT: The second dispute, as I noted,  
18   pertains to the landlord's contention that the tenant  
19   breached the implied covenant of good faith and fair dealing  
20   that exists in every contract governed by California law,  
21   including lease agreements.

22           I guess before I go to that, let me cite Lennar  
23   Mare, M-A-R-E, Island v. Steadfast Insurance Company, 176  
24   F.Supp 3d. 949, Ed. CA 2016, as the source for my summary of  
25   California law on contract interpretation, use of parol

1 evidence, resolution of ambiguities and course of  
2 performance.

3 That case has an extensive discussion of all of  
4 those issues citing substantial California law opinion.

5 (Pause)

6 THE COURT: So, the implied covenant of good faith  
7 and fair dealing clearly exists in all contracts governed by  
8 California law including leases, Wolf v. Walt Disney  
9 Pictures and Television, 162 Cal App 4th, 1107, Cal App  
10 2008.

11 There are serious limitations on it, however, as  
12 noted by the Wolf Court "the implied covenant will only be  
13 recognized to further the contract's purpose. It will not  
14 be read into a contract to prohibit a party from doing that  
15 which is expressly permitted by the agreement itself."

16 The general rule regarding the covenant of good  
17 faith is plainly subject to the exception that the parties  
18 made by express provisions of the contract, grant the right  
19 to engage in the very acts and conduct which would otherwise  
20 have been forbidden by an implied covenant of good faith and  
21 fair dealing.

22 This principle is consistent with the general rule  
23 that implied terms cannot vary the express terms of a  
24 contract.

25 If the defendant did what it was expressly given

1 the right to do, there could be no breach.

2 Thus, although it has been said, the implied  
3 covenant finds particular application in situations where  
4 one party is invested with a discretionary power affecting  
5 the rights of another if the express purpose of the contract  
6 is to grant unfettered discretion and the contract is  
7 otherwise supported by adequate consideration that the  
8 conduct is, by definition, within the reasonable expectation  
9 of the parties and can never violate an implied covenant of  
10 good faith and fair dealing.

11 The reference to reasonable expectations is  
12 important. I'm sorry. See, also, Storek & Storek v. Citi  
13 Corp Real Estate, Inc., 100 Cal App 4th 44, Court of Appeals  
14 Cal 2002.

15 The requirement of reasonableness or reasonable  
16 expectations is important to the implication of the implied  
17 covenant in the context where there is no express agreement  
18 governing the parties' expectations.

19 Even there, the burden that the implied covenant  
20 would place on the party against which it is being asserted  
21 must be reasonable. See Sachs v. Exxon Co., U.S.A., 9 Cal  
22 App 4th 1491, Cal App 1992.

23 Here, as I noted, the 2015 amended and restated  
24 lease was entered into by the parties in light of  
25 anticipated substantial work to be done on the building

1 including, without limitation, as set forth in paragraph 8  
2 of the agreement, seismic work.

3 That paragraph says landlord is responsible for  
4 all necessary seismic repairs and improvements within and in  
5 the vicinity of the premises and the overall building.

6 The landlord shall use best efforts to obtain  
7 necessary government approvals to perform such seismic  
8 repairs and improvements within 12 months after the City of  
9 Los Angeles's approval of administrator's determination of  
10 the city applications described in Recital D of this  
11 amendment and complete such seismic repairs and improvements  
12 within 12 months of when said permits are issued subject to  
13 the terms of Section 9 below.

14 As an aside, that Section 9 prohibits work over  
15 the specifically laid out Christmas sale season.

16 Section 8 then continues; notwithstanding anything  
17 contained herein to the contrary, all seismic permits and  
18 seismic repairs and replacements shall be applied for,  
19 installed and completed within such time as required by law  
20 of by governmental authorities.

21 The plans and specification schedule, authorized  
22 hours of construction activity and remediation plan for such  
23 seismic work shall be pre-approved by tenant pursuant to the  
24 demolition and construction protocol attached hereto as  
25 Exhibit C; which also, of course, was referred to in



1 Section 2 of the agreement.

2 And, then, Section 8 continues; and conducted in a  
3 manner that creates the minimum possible visual and noise  
4 inconvenience to tenant and its customers.

5 Turning to Exhibit P -- C, excuse me, the  
6 demolition and construction control protocol. It provides,  
7 in Section 2(b), a mechanism for the landlord to make its  
8 proposal and contemplated by Section 8, that I just quoted.

9 Section 2(b) of Exhibit C states landlord shall  
10 provide two weeks' notice for any demolition or construction  
11 work not involving remediation or removal of hazardous  
12 materials at the building parcel and shall include in that  
13 notice the scope of work contemplated, a detailed set of  
14 plans and specifications for the same, together with the  
15 schedule, authorized hours of construction activity and  
16 remediation plan for the same.

17 Tenant shall have ten business days from receipt  
18 of landlord's both notice and complete detailed plans and  
19 specifications to provide any comments and/or objections.

20 No reply from tenant within that period shall  
21 constitute approval.

22 Landlord may proceed with the work in question  
23 after complying with the aforesaid procedures provided the  
24 work in question is approved by tenant or deemed approved by  
25 tenant as aforesaid.

1           The landlord, I believe, acknowledges that the one  
2       written communication that is in the record, the September  
3       28, 2018 email to Sears in-house counsel working on  
4       building-related matters with respect to this real property,  
5       did not comply with Section 2(b) that I've just quoted.

6           Even if that wasn't conceded, it's clear from  
7       reading the email and the attachments that it does not  
8       include a detailed set of plans and specifications together  
9       with a scheduled authorized hours of construction activity  
10      and remediation plan as required by Section 2(b) of  
11      Exhibit C.

12           There's nothing in the record to suggest that such  
13      a proposal was ever made.

14           What the landlord contends instead is that it was  
15      understood by the parties that the September 28 e-mail was a  
16      negotiating start and that Sears did not thereafter  
17      negotiate with the landlord or even after the -- even after  
18      the start of the bankruptcy case respond to the landlord  
19      when it sought to negotiate. That, the landlord contends,  
20      constitutes a breach of the implied covenant of good faith  
21      and fair dealing. I conclude to the contrary that it does  
22      not constitute such a breach. The parties have very  
23      carefully laid out, as was evidently reasonable for them to  
24      do given the nature of the 2015 amended and restated lease,  
25      how such a proposal would be made, when it would be deemed

1 accepted, when it would be treated as rejected and what the  
2 parties were supposed to do thereafter.

3 Here, there was no such proposal made in the first  
4 place. If, when faced with no response from the tenant, the  
5 landlord wished to proceed, the agreement actually gave the  
6 landlord a mechanism in which to do so and spelled out the  
7 tenant's rights and duties with respect to such a mechanism.

8 The landlord would make a proposal compliant with  
9 Section 2(a). The tenant would have ten days to object.  
10 And if no reply from the tenant within that period was  
11 received, the tenant would be deemed to have approved and  
12 the landlord could proceed with the work in question.

13 The landlord did not follow that protocol.

14 It's clear, further, although unnecessary for my  
15 ruling, that in response to the September 28 proposal, which  
16 clearly was not in compliance with Section 2(b) of  
17 Exhibit C, Sears responded negatively as set forth in  
18 Mr. Velkei's e-mail in the email chain.

19 (Pause)

20 THE COURT: It should be clear though, but I'll  
21 state that, that negative response did not trigger an  
22 obligation by Sears under Section 2(c) of Exhibit C which  
23 states, if tenant lodges timely objections to any notice  
24 hereunder, the parties hereto must agree upon the scope and  
25 course of the work together with the schedule authorized

1 hours of construction activity and remediation plan for the  
2 same before it may proceed.

3 Such consent by tenant may not be unreasonably  
4 withheld.

5 But, again, since no such proposal was made in the  
6 first place, the rejection by Sears indicates that merely  
7 the non-compliant proposal was unacceptable. It doesn't  
8 trigger an obligation, on the tenant's part, to proceed to  
9 work on a proposal with the consent not to be unreasonably  
10 withheld.

11 Indeed, the rejection beyond rejecting something  
12 that was non-compliant itself refers to the fact that the  
13 proposal had significant holes in it as far as laying out a  
14 detailed set of plans and specifications and timing.

15 So, given that fact or set of facts as laid out in  
16 the agreement between the parties, there is no implied  
17 covenant that could be breached given that the parties  
18 actually specified how to deal with this set of potential  
19 facts.

20 I'll also note that the contention that the tenant  
21 was responsible for the termination of prospective financing  
22 for the renovation or remediation, by the terms of the  
23 landlord's own argument, is not tenable.

24 The testimony was to the effect that the bank's  
25 condition was that there be an agreement with Sears as far

1 as the access for the seismic work and remediation.

2 The parties, indeed, had an agreement. The  
3 landlord didn't follow it. Consequently, what the condition  
4 required was a new agreement which Sears was under no  
5 obligation to provide either under the plain terms of the  
6 parties' existing agreements or any sort of implied covenant  
7 of good faith and fair dealing.

8 So, I will deny that aspect of the cure objection  
9 as well. So, I'll enter an order granting the objection as  
10 far as the first two points, CAM and tax reimbursement and  
11 deny it in all other respects.

12 You don't need to refer --

13 MS. MARCUS: Your Honor --

14 THE COURT: I'm sorry. I don't -- let me just  
15 finish.

16 You don't need to do anything more than refer to  
17 my bench ruling.

18 Okay. That's someone on the phone?

19 MS. MARCUS: Yes. Sorry, Your Honor. This is  
20 Jacqueline Marcus on behalf of Sears Holdings Corporation.

21 THE COURT: Yes.

22 MS. MARCUS: I'm reluctant to venture into this  
23 after you've spent so much time on it this morning. But I  
24 just wanted one clarification.

25 THE COURT: Okay.

1 MS. MARCUS: You said a little bit earlier that  
2 you haven't decided whether the landlord is entitled to be  
3 paid for the work it had already done and that there might  
4 be a claim for quantum meruit.

5 THE COURT: Right.

6 MS. MARCUS: On behalf of Sears, what I want to  
7 make sure of is that there's nothing in your order today  
8 that basically transfers what might have been an unsecured  
9 claim against Sears into a post-petition administrative  
10 claim because the lease is being assumed and assigned. But,  
11 from our perspective, any amounts that would be owed to the  
12 landlord would really be attributable to Transform not to  
13 the debtors.

14 THE COURT: Well, that issue isn't really before  
15 me. The benefit obviously has to be for the debtor, for the  
16 estate, as far as the administrative claim is concerned.  
17 So, you know -- but that issue really isn't before me. I'm  
18 not allowing any claim. In fact, I don't have any real  
19 evidence to support a claim.

20 And, again, although I'm not ruling on this, it  
21 does appear to me that the purpose of the agreement is to  
22 secure whatever amounts are owing. I'm not talking about  
23 the 3.25 million agreement. It's to secure whatever amounts  
24 are owing in respect to the construction. So, all of the  
25 issues would have to be sorted out.

1 MR. MARCUS: I -- yes. I guess from the debtor's  
2 point of view if it -- if it were going to be in a worse  
3 position as a result of the assumption than it would have  
4 been as a result of rejection --

5 THE COURT: Right.

6 MS. MARCUS: -- that would obviously be of concern  
7 to us.

8 THE COURT: Well, I find that -- I understand it  
9 would be a concern but I find it -- that that state of  
10 affairs would be highly unlikely given (a) the purpose of  
11 the construction fund and (b) the requirement for any  
12 administrative expense that it be for the benefit of the  
13 debtor's estate.

14 MS. MARCUS: Okay. Thank you.

15 THE COURT: You know, here this is --

16 MS. MARCUS: That --

17 THE COURT: It's construction work that benefits  
18 the building but not really Sears except, you know, to the  
19 extent that the -- it's new Sears, the landlord -- the  
20 landlord's new tenant, Transform.

21 MS. MARCUS: Okay. Thank you, Your Honor.

22 THE COURT: But I'm not ruling on that either. I  
23 mean, that's really not before me.

24 MS. MARCUS: I know. I know.

25 THE COURT: What's before me now is a cure

1 objection and that requires defaults under a contract given  
2 the default by the tenant in providing the services under  
3 the contract -- I'm sorry, given the default by the landlord  
4 to provide the services under the contract, I don't see a  
5 default under the contract to be paid for. Although, you  
6 know, again, that --

7 MS. MARCUS: Okay.

8 THE COURT: -- doesn't necessary mean that there  
9 isn't some other right to payment from some source.

10 Okay. So, you don't have to --

11 MS. MARCUS: Thank you.

12 THE COURT: -- settle that order formally but you  
13 should circulate it to counsel for the landlord as well as  
14 counsel for the debtor.

15 MR. WEAVER: We'll do that, Your Honor. We'll get  
16 that e-mail to you as soon as we can.

17 THE COURT: Okay.

18 MR. WEAVER: And Your Honor should note our  
19 deadline, I believe, is a week from today. So, we'll work  
20 to get the order to you --

21 THE COURT: Okay.

22 MR. WEAVER: -- before then.

23 THE COURT: That's fine. I -- you know, frankly,  
24 I don't know if there's any hope in doing this but I still  
25 urge the parties to try to work with each other to get the



1 construction going. That might be a no brainer for each  
2 side.

3 MR. WEAVER: Your Honor, my understanding is that  
4 the parties have reached -- Transform has reached out, Your  
5 Honor.

6 THE COURT: All right. Okay.

7 MR. WEAVER: Thank you, Your Honor.

8 THE COURT: Thank you.

9 MR. KUPETZ: Thank you.

10 (Whereupon, these proceedings were concluded at 1:36  
11 p.m.)  
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I N D E X

R U L I N G S

DESCRIPTION

PAGE

LINE

Court will enter an order granting

133

9

Landlord's cure objection as far as CAM

and tax reimbursement are concerned but

denied as to all other aspects

E X H I B I T S

NO. DESCRIPTION

ID.

EVID.

JOINT EXHIBITS:

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6

FOR THE LANDLORD:

5-10 Various e-mail exchanges between

Landlord and his counsel

---

19

15 Summary document relating to wire

---

19

transfers

2-4 Various invoices and checks

---

54

Declaration of Izek Shomof dated

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22

May 1, 2019

Supplemental declaration of Izek

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22

Shomof dated July 26, 2019

C E R T I F I C A T I O N

We, Lisa Beck, Jamie Gallagher and Pamela Skaw certify that  
the foregoing transcript is a true and accurate record of  
the proceedings.

**Lisa Beck**  
Digitally signed by Lisa Beck  
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Date: 2019.08.05 12:00:54 -04'00'

**Lisa Beck**

**Jamie Gallagher**  
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**Jamie Gallagher**

**Pamela Skaw**  
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**Pamela Skaw**

**Date: August 5, 2019**

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**Suite 300**

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<b>&amp;</b>	48:22 49:2,18	<b>183116</b> 57:14	52:16 56:19,22
<b>&amp;</b> 5:2,17 83:10 127:12	82:12 105:5,20 115:5	<b>1837</b> 2:10	80:3,4 81:18
<b>0</b>	<b>1107</b> 126:9	<b>19</b> 39:5 115:22 138:17,18	84:19 103:11
<b>08001pr</b> 26:25 27:6,14	<b>11501</b> 139:23	<b>1992</b> 127:22	104:14 111:5
<b>08002a</b> 28:11	<b>11th</b> 31:4,10 76:22	<b>1999</b> 2:9,14,20 3:3 3:10	112:14 113:11,25
<b>08002pr</b> 27:25 28:5	<b>12</b> 9:16 28:8 36:3 36:6 78:8 80:11 80:12 105:24 128:8,12	<b>1st</b> 12:6 24:1,3,8 25:10,22,25 26:10 29:9,15 31:7,12 37:5 46:6 58:13 68:7 71:10 73:13 79:9 86:19 116:8 116:8	114:21 119:1,17 127:23 130:24
<b>1</b>	<b>13</b> 9:16 55:4	<b>2</b>	<b>2016</b> 125:24
<b>1</b> 7:4 8:4 10:11 15:9,21 19:8 20:4 21:9 22:8 24:23 26:4 42:2 45:15 45:22,25 46:2,16 46:23 47:6,8,15 47:18 56:12 60:17 61:1,10,20,21,24 66:12,20,24 67:10 75:13 79:17 92:7 115:7 117:15 118:4,16,24 119:6 119:15 123:8,13 125:2,3,15 138:22	<b>133</b> 138:6	<b>2</b> 1:20 8:2 15:19 19:9,12 20:9,12 26:24 28:4,22 32:20 35:21 54:22 54:23 56:14 58:8 59:5 61:6 79:18 80:4,6 81:6 106:14,14 107:24 107:25 109:8,13 114:7,23 116:7 117:11 120:10,11 120:25 129:1,7,9 130:5,10 131:9,16 131:22	<b>2017</b> 12:6 24:1,4,8 24:24 26:6,25 27:5,14,24 28:4 28:10 29:9,15 30:2,9,24 31:4,7 31:12 32:16 45:15 45:25 46:2,6,16 46:23 47:6,8,16 47:19 52:13 53:6 53:10,14 60:17 66:12 79:11 99:23 115:7 116:8,9 117:15 118:5,16 118:24 119:3,6 123:6,8 125:12
<b>1.5</b> 27:1	<b>135</b> 23:5,8,10,11 23:15 24:11 35:20 81:3	<b>2-4</b> 138:20	<b>2018</b> 32:17,22 36:23 46:24,24 52:5 77:12 84:22 104:23 130:3
<b>10</b> 8:18 11:6 19:16 19:17 23:14,16 27:22,22 28:21 33:1,18 59:5 81:14 115:5,16 117:11	<b>14</b> 9:16,17 19:18 29:15 78:10 79:9 118:23	<b>20</b> 42:15	<b>2019</b> 1:20 20:4,5 21:9,10 22:8,11 33:7 37:5,6 51:16 55:4 84:23 138:22 138:24 139:18
<b>100</b> 46:5 127:13	<b>146</b> 42:12,15	<b>2002</b> 127:14	<b>205,000</b> 34:24
<b>10006</b> 5:20	<b>1491</b> 127:22	<b>2004</b> 55:13	<b>22</b> 138:21,23
<b>1006</b> 7:5	<b>15</b> 9:16 10:1 17:18 19:19,20 30:19 37:5 138:18	<b>2007</b> 61:1,24	<b>23</b> 68:15 69:15 71:1 76:4,10
<b>1008</b> 2:7,13,19	<b>16</b> 10:8 15:11,22 18:21 19:19 23:5 23:7,15 53:13	<b>2008</b> 126:10	<b>23rd</b> 33:6
<b>10153</b> 5:5	<b>162</b> 126:9	<b>2011</b> 56:12,20 79:17 111:4 114:4 114:7	<b>248</b> 1:17
<b>10309</b> 111:6	<b>16th</b> 26:25 27:5 27:14,24 28:4,10 41:8,11,15,18 53:6	<b>2014</b> 29:22 52:10 52:10	<b>24th</b> 8:23 11:13 41:20 42:4
<b>10601</b> 1:18	<b>17</b> 14:19 23:10 32:25 33:2,14 35:19 115:23 119:17 124:18	<b>2014/2015</b> 53:5	<b>25</b> 24:10 42:22 58:10,25 65:25 88:7 89:17 90:24
<b>10:08</b> 1:21	<b>176</b> 125:23	<b>2015</b> 22:22 23:20 29:24 35:12,12	
<b>11</b> 2:2,9,14,20 3:3 3:5,10 9:16 19:18 28:3 45:6,16	<b>17th</b> 10:19,20		
	<b>18</b> 23:11 29:18 36:25 37:8		
	<b>18,853</b> 28:11		
	<b>18-23538</b> 1:4 2:1		

[25 - acknowledges]

Page 2

100:20 101:14 112:14 116:14 117:13,21 118:19 119:23 120:4,11 121:9,20 122:1 123:4,5 125:5 <b>25's</b> 120:19 <b>250</b> 63:13 <b>25th</b> 81:20 <b>26</b> 20:5 21:10 22:10 138:24 <b>2650</b> 3:17,22 4:4 <b>26th</b> 20:10 43:7 <b>28</b> 24:11 130:3,15 131:15 <b>2:17</b> 31:10 <b>2nd</b> 76:13	102:1,2 116:9 119:20 120:24 122:18 <b>322,649</b> 34:6 <b>322,649.80</b> 112:21 <b>3298</b> 2:5 <b>33</b> 17:10 65:18 <b>330</b> 139:21 <b>333</b> 5:11 <b>34</b> 17:10 65:23,24 <b>3400</b> 5:12 <b>346</b> 118:16 119:1 <b>3477</b> 2:15 18:22 <b>3478</b> 2:21 <b>35</b> 66:3 <b>36</b> 108:12 <b>365</b> 3:5 57:1 111:18 <b>375,000</b> 72:14 <b>3817</b> 3:6 <b>39</b> 105:9 <b>3:15</b> 12:11 <b>3d</b> 125:24	<b>4th</b> 126:9 127:13 127:22 <b>5</b> <b>5</b> 8:18 11:6 12:25 13:5 19:14,16,17 22:24 27:4 28:21 64:20 66:20 76:24 90:16 93:24 115:5 117:23 139:18 <b>5,000</b> 57:11 <b>5,696,000</b> 18:24 <b>5-10</b> 138:16 <b>50</b> 65:10 105:10 <b>54</b> 138:20 <b>6</b> <b>6</b> 8:18 20:9,11,12 22:22 23:3 24:11 24:22 27:23 28:9 35:11,20 60:17,18 61:9 64:20 66:20 78:5 90:17 94:5 115:5 117:15,23 118:4 138:14 <b>7</b> <b>7</b> 8:18 24:22 26:21 26:21 28:9 60:17 60:18 61:10 64:21 78:7 90:17 93:25 115:5 117:15,23 118:4,16 119:1 <b>70</b> 51:8,10 113:9 <b>727,000</b> 72:15 <b>75</b> 34:17,18 65:5,6 65:10,25 <b>767</b> 5:4 <b>8</b> <b>8</b> 8:18 26:22,22 28:21 35:19 78:11 80:8 84:2 90:22 90:24 100:6 113:11 115:5,16 119:9 128:1,16	129:2,8 <b>8/12/17</b> 27:9 <b>8/18/17</b> 27:15 <b>80,000</b> 29:18 <b>9</b> <b>9</b> 8:18 19:14 27:3 78:11 115:6 127:21 128:13,14 138:6 <b>9/25/2018</b> 105:15 <b>90071</b> 5:13 <b>949</b> 125:24 <b>983,000</b> 28:6 <b>a</b> <b>able</b> 55:9 59:17 62:14 84:18 116:25,25 <b>absolutely</b> 9:13 34:15,22 42:11 69:6 <b>absurd</b> 82:6 <b>accept</b> 121:24 <b>acceptable</b> 25:16 58:15 59:16,20 107:19 108:18 <b>acceptance</b> 64:21 66:22 67:1 117:24 <b>accepted</b> 108:4 131:1 <b>accepts</b> 124:6 <b>access</b> 51:7,13 56:16 67:11 86:8 98:21 99:1 100:17 114:10 133:1 <b>account</b> 67:25 <b>accurate</b> 139:4 <b>acknowledge</b> 56:14 114:8 <b>acknowledged</b> 32:8 125:8 <b>acknowledges</b> 31:11 77:5 94:22 114:21 130:1
<b>3</b> <b>3</b> 8:2 15:19 20:11 20:12 22:23 23:13 23:14,16 24:22 27:4 28:22 37:1 37:12,19 60:17,18 61:9 64:20 66:19 79:18 81:20 90:16 114:7 115:5,16 117:15,22 118:4 <b>3,250,000</b> 87:24 112:16 <b>3.25</b> 24:13 58:12 89:18 134:23 <b>30</b> 15:13 41:5 51:9 51:10 53:17,20,25 59:13 85:21 86:4 86:8 111:5 116:23 <b>300</b> 1:17 28:23 139:22 <b>31</b> 15:13 <b>322</b> 71:25 73:4,6 93:2 <b>322,000</b> 33:7 35:1 72:9,21 75:8 85:17 91:2 92:13	<b>4</b> <b>4</b> 3:5 8:2 15:20 19:10,12 22:23 24:22 26:23 27:23 28:22 54:22,23 60:17,18 61:9 64:20 66:20 90:16 115:5 117:15,23 118:4 <b>4186</b> 3:13 <b>44</b> 127:13 <b>44,000</b> 57:22 <b>4489</b> 3:18 <b>45</b> 105:20,20 <b>4624</b> 3:23 12:25 <b>4625</b> 4:5 15:12,22 105:10 <b>478,000</b> 27:7,15 <b>48</b> 81:2	<b>8</b> <b>8</b> 8:18 26:22,22 28:21 35:19 78:11 80:8 84:2 90:22 90:24 100:6 113:11 115:5,16 119:9 128:1,16	

[acknowledgment - amounts]

<b>acknowledgment</b> 99:17	<b>admission</b> 123:16	63:3 64:13 68:12	<b>allowing</b> 26:3,13
<b>acquiesce</b> 125:9	<b>admit</b> 14:25 17:20	68:23 69:8 73:19	102:14 134:18
<b>acquiesced</b> 96:14	19:6 22:6 54:21	74:1 80:24 81:17	<b>allows</b> 100:17
96:15	85:15	83:4,18 84:1 88:3	<b>alteration</b> 124:14
<b>acquiescence</b> 79:2	<b>admitted</b> 10:5	88:5,22 89:7 91:5	<b>ambiguities</b> 89:8
<b>acquiesces</b> 124:7	16:6 18:19 19:9	94:8,9,13 95:4,11	126:1
<b>action</b> 74:6	19:11,15,19,19,19	97:2,25 98:6,10	<b>ambiguity</b> 123:21
<b>active</b> 85:19,20	20:1	99:2,10 103:10,10	<b>ambiguous</b>
<b>activity</b> 36:10	<b>adopted</b> 20:2	103:11,22,24,25	123:22
80:16 81:12 106:7	<b>advance</b> 85:8	103:25 104:4,7,12	<b>amended</b> 52:20
106:21 107:8	<b>advances</b> 105:3	104:13 109:5	111:4 112:14
128:22 129:15	<b>advised</b> 105:22	111:19 112:4	113:25 114:5
130:9 132:1	<b>affairs</b> 135:10	114:23 115:2,11	115:10 116:4
<b>acts</b> 126:19	<b>affect</b> 31:20 98:17	115:21 116:4,13	119:1,17 127:23
<b>actual</b> 19:2 34:18	98:20	116:21 118:13	130:24
38:4,7,9 55:22	<b>affidavit</b> 108:4	119:10 120:22	<b>amendment</b> 22:23
57:4 64:10 75:11	<b>affiliates</b> 5:18	121:14 123:18,19	22:24 23:20 24:17
124:15	<b>aforesaid</b> 107:2,4	123:21,22 124:2	35:12,12,17 36:13
<b>add</b> 29:18	129:23,25	124:10,14,14,19	53:1 56:20,22,22
<b>addition</b> 28:13	<b>afraid</b> 51:5,6	124:24 126:15	68:15 80:3,5
67:1 112:8 122:13	<b>agent</b> 14:7,12,14	127:17 128:2	81:19 84:19 89:21
<b>additional</b> 2:5	<b>ago</b> 8:8 39:20	129:1 131:5	106:4 108:12
17:4 25:3 61:5	<b>agree</b> 23:21 37:5	132:16,25 133:2,4	114:21 115:10,24
72:12 114:2,22	38:3 64:9 72:20	134:21,23	116:1,19 117:3
117:19 125:11	72:25 86:17 107:6	<b>agreements</b> 109:5	128:11
<b>address</b> 6:12 11:6	110:12 112:17	109:15,16 125:21	<b>american</b> 59:14
66:15 67:15,16	123:11 131:24	133:6	<b>amount</b> 2:7 13:25
74:21 104:20	<b>agreed</b> 6:18 14:13	<b>ahead</b> 11:25 75:16	18:13,24 27:1,6
<b>addressed</b> 76:1	22:24 23:25 24:20	95:7 104:22	27:15,25 28:5,11
82:11 115:15	25:5,6,11,14	<b>ahh</b> 34:11	33:6,7 34:3,6
<b>adequate</b> 127:7	35:13,23 36:2,9	<b>al</b> 1:10 2:1	57:18,23 64:24
<b>adjust</b> 25:22,25	36:15 46:1,21	<b>alan</b> 49:12,13,20	71:19 72:21 73:10
<b>adjusts</b> 26:10	47:17 59:24 62:4	49:20,22	92:17,19,20
<b>administrative</b>	103:4 110:8	<b>albeit</b> 120:21	100:14 102:1
134:9,16 135:12	111:25 117:4,9	<b>aline</b> 2:8,13,19 3:2	112:16,17,18,22
<b>administrator's</b>	125:15	3:9 21:3	112:25 113:2
128:9	<b>agreement</b> 10:16	<b>alleged</b> 113:14	117:9 118:2 120:9
<b>admissibility</b> 6:17	10:19 14:10 23:25	<b>allegedly</b> 113:16	121:4 122:8 123:7
15:2	24:5,12,20 25:21	113:21	<b>amounts</b> 25:3
<b>admissible</b> 16:22	25:24 26:12 46:21	<b>allow</b> 11:6 19:24	61:5 110:23 112:1
124:9	51:3,14 52:15	20:1 51:4 105:1	112:2,7,13 117:19
	53:1 58:7 59:3,20	<b>allowed</b> 13:6	134:11,22,23
	59:25 60:3,6,8	98:25	

[andrew - august]

Page 4

<p><b>andrew</b> 5:22 6:4 55:2</p> <p><b>angeles</b> 3:17,23 4:4 5:13 21:8 36:3 40:25 55:13 78:4 111:7,9</p> <p><b>angeles's</b> 128:9</p> <p><b>answer</b> 34:5 42:16 43:1,3,4,15 53:11 63:19,20 87:4</p> <p><b>answered</b> 41:23</p> <p><b>anticipate</b> 32:21</p> <p><b>anticipated</b> 127:25</p> <p><b>antithetical</b> 96:16</p> <p><b>anyway</b> 91:3</p> <p><b>apa</b> 110:9</p> <p><b>apologize</b> 26:22 31:2,10 33:20 37:17 77:2</p> <p><b>app</b> 126:9,9 127:13,22,22</p> <p><b>apparent</b> 11:13 11:16 12:4 103:2</p> <p><b>apparently</b> 77:25 118:24</p> <p><b>appeals</b> 94:4 127:13</p> <p><b>appear</b> 39:11 134:21</p> <p><b>appearing</b> 11:1</p> <p><b>appears</b> 17:9 69:24 107:11</p> <p><b>application</b> 96:11 127:3</p> <p><b>applications</b> 128:10</p> <p><b>applied</b> 128:18</p> <p><b>apply</b> 12:24 83:5 90:20 101:3,9 121:12,22</p> <p><b>appreciate</b> 7:21 109:14</p>	<p><b>approach</b> 11:22 22:13 88:24</p> <p><b>appropriate</b> 9:10</p> <p><b>approval</b> 25:18 64:24 79:19 81:15 93:19 102:6 107:1 114:14 118:1 128:9 129:21</p> <p><b>approvals</b> 128:7</p> <p><b>approve</b> 31:24</p> <p><b>approved</b> 36:4,11 80:17 102:6 107:3 107:3 115:13 128:23 129:24,24 131:11</p> <p><b>approves</b> 80:12</p> <p><b>approximate</b> 65:25</p> <p><b>approximately</b> 28:23 65:25 72:15</p> <p><b>april</b> 12:6 24:1,3,8 24:23 25:10,22,25 26:4,10 27:5 29:9 29:15 31:7,12 45:15,22,25 46:2 46:2,6,16,23,24 47:6,8,15,18 51:16,17 52:5 58:13 60:17 61:1 61:10,20,21,24 66:12,20,24 67:10 68:7 75:13 76:13 79:9,11 92:6 115:6 116:8,8 117:15 118:4,16 118:24 119:6,15 123:8,13 125:2,3 125:15</p> <p><b>area</b> 67:21 79:22 112:6 114:12,17</p> <p><b>arguably</b> 57:16 107:22</p>	<p><b>argue</b> 70:5 78:22 78:25 79:25 84:15 85:10 101:7</p> <p><b>arguing</b> 58:3 74:9 81:18</p> <p><b>argument</b> 6:10 11:20 54:11,25 62:21,22 84:6 87:5 88:25 89:1 94:20 99:7 109:19 121:25 132:23</p> <p><b>arguments</b> 67:16 73:12 86:16 102:22</p> <p><b>arising</b> 116:3</p> <p><b>ascertaining</b> 94:7</p> <p><b>aside</b> 78:7 128:14</p> <p><b>asked</b> 34:20 41:23 43:12,21 48:20 49:7 65:3 95:23</p> <p><b>asking</b> 26:6 27:19 30:6 31:16 40:15 40:16,20 45:23 46:6 50:16</p> <p><b>aspect</b> 122:9 133:8</p> <p><b>aspects</b> 122:13 138:9</p> <p><b>assert</b> 111:15</p> <p><b>asserted</b> 103:3 111:24 112:3,7,11 113:13 127:20</p> <p><b>assertion</b> 116:10</p> <p><b>assign</b> 21:8 57:19</p> <p><b>assigned</b> 55:5 134:10</p> <p><b>assignee</b> 111:25</p> <p><b>assignment</b> 2:4 3:16,21 4:3 111:12,14,22</p> <p><b>assigns</b> 110:6</p> <p><b>associate</b> 32:19</p>	<p><b>associated</b> 35:16</p> <p><b>associates</b> 31:20</p> <p><b>assume</b> 21:8 57:19 106:3 107:16</p> <p><b>assumed</b> 55:5 82:8 134:10</p> <p><b>assumes</b> 38:18 110:6 121:22</p> <p><b>assuming</b> 33:12 34:6,13,14 37:22 63:6 84:5</p> <p><b>assumption</b> 2:4 3:5,12,16,21 4:3 6:8 32:14 33:9,23 34:1 63:11 68:9 77:9,10 111:11,14 135:3</p> <p><b>assure</b> 51:15</p> <p><b>asterisk</b> 33:11 63:12</p> <p><b>attach</b> 28:14 40:13 93:1</p> <p><b>attached</b> 8:6 10:9 18:11 26:15 27:18 29:2 31:2 33:2,3 35:6 36:13 37:11 38:25 39:7 40:15 48:18 80:18 93:4 106:9 115:3,15 128:24</p> <p><b>attachments</b> 130:7</p> <p><b>attempts</b> 55:20</p> <p><b>attorney</b> 40:12 49:13 50:3,10</p> <p><b>attorneys</b> 5:3,10 5:18</p> <p><b>attributable</b> 113:22 134:12</p> <p><b>august</b> 1:20 26:25 27:14,24 28:4,10 37:5 53:6,10,13</p>
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[august - cal]

Page 5

139:18 <b>authorities</b> 128:20 <b>authorized</b> 36:10 80:15 81:12 106:6 106:20 107:8 110:18 128:21 129:15 130:9 131:25 <b>authorizing</b> 110:16 <b>autonomy</b> 83:22 <b>avenue</b> 5:4,11 <b>avoid</b> 119:10 125:11 <b>aware</b> 13:23 67:8 83:15 119:14,15	<b>bad</b> 96:14 98:9 <b>bank</b> 103:23 104:6 <b>bank's</b> 132:24 <b>bankrupt</b> 51:12 <b>bankruptcy</b> 1:2 1:16,25 49:4 50:3 51:6 55:21 67:6 82:4 84:12 85:4 105:23 111:18 130:18 <b>base</b> 16:7 <b>based</b> 7:7 16:24 63:9 66:11 71:15 75:11 104:9 113:14 <b>baseline</b> 107:17 <b>basically</b> 34:20 37:14 48:3 50:25 57:1 64:14 97:14 108:15 134:8 <b>basis</b> 55:22 57:17 85:16 92:2 94:15 122:24 <b>beck</b> 4:25 139:3,8 <b>beginning</b> 8:21 32:22 80:6 86:4 <b>begins</b> 30:24 39:15 114:24 <b>behalf</b> 6:5 11:1 50:6 55:2 93:19 111:17 133:20 134:6 <b>belabor</b> 58:11 94:16 <b>believe</b> 8:12 10:1 17:18 41:25 61:8 62:13 70:8 73:8 86:11 96:18 120:14 124:22 130:1 136:19 <b>belongs</b> 77:9	<b>bench</b> 133:17 <b>benefit</b> 55:21 134:15 135:12 <b>benefits</b> 135:17 <b>best</b> 36:2 50:2 55:18 96:13 109:7 128:6 <b>better</b> 102:18 <b>beyond</b> 9:7 71:20 97:25 99:6 132:11 <b>big</b> 48:12 50:19 58:4 <b>biggest</b> 42:22 <b>bill</b> 34:3 61:7 64:4 64:8 73:9,10 78:24 79:2,6,8 <b>billed</b> 16:13 30:12 <b>bind</b> 108:1,22 <b>binder</b> 6:22 20:6 20:6,7 22:12,22 30:19 33:1,16,17 36:25 42:2 54:22 78:14 <b>binders</b> 6:14 <b>bit</b> 7:24 41:14 63:9 134:1 <b>block</b> 94:4 <b>bottle</b> 44:22 <b>bought</b> 56:13 <b>boulevard</b> 3:17,22 4:4 55:12 111:6,8 111:9 <b>boyle</b> 42:18 <b>brainer</b> 137:1 <b>breach</b> 68:22 73:25 74:1,3,6 81:18 96:15 97:2 108:18 112:24 113:14 121:10 127:1 130:20,22 <b>breached</b> 98:7 125:19 132:17	<b>breakdown</b> 18:23 19:1 <b>brief</b> 51:21 54:24 55:1 <b>briefing</b> 3:13 <b>briefly</b> 56:11 78:3 <b>bring</b> 74:6 <b>broad</b> 45:14 <b>broken</b> 39:19 <b>bucket</b> 7:10 8:2 8:17 9:15 <b>buckets</b> 6:25 <b>buffer</b> 72:17 <b>building</b> 53:18 55:12,14 56:13,17 56:19 78:6 105:7 106:17 114:3,11 115:24 116:1,4 127:25 128:5 129:12 130:4 135:18 <b>bunch</b> 52:4 <b>burden</b> 84:16 127:19 <b>burst</b> 85:13 <b>business</b> 56:15 57:24 103:20 106:22 107:15 109:14 114:9 129:17 <b>busy</b> 84:13 <b>buyer</b> 3:2,9
<b>b</b> <b>b</b> 1:23 57:1 60:25 81:6 101:10 106:14,14 107:24 107:25 129:7,9 130:5,10 131:16 135:11 138:11 <b>back</b> 23:2 29:22 29:24 35:11 37:20 41:23 49:23 51:16 54:20 55:13 59:9 66:2,23 70:12,18 81:24 84:24 90:3 93:11 107:22 <b>background</b> 56:11 <b>backup</b> 8:3 9:18 10:10 16:11,12 28:14,17,18 29:5 30:1,8,14 34:15 34:17,22,24 35:1 35:3,3,4 53:5 71:4 73:9 75:16 92:16 97:3 118:22 122:17	<b>c</b> <b>c</b> 5:1 6:1 80:18,23 106:10,13 107:5 108:14 109:13 115:4 128:25 129:5,9 130:11 131:17,22,22 139:1,1 <b>ca</b> 5:13 125:24 <b>cal</b> 126:9,9 127:13 127:14,21,22		



[calendar - communications]

<b>calendar</b> 53:2	<b>certainly</b> 11:18	<b>cite</b> 69:13 76:9	104:14 107:18
<b>california</b> 3:18,23	16:4 67:9 85:17	83:9 125:22	121:22 124:8
4:5 13:1,5 69:13	86:10 89:13,14	<b>cited</b> 13:4 84:2	126:7 131:16
72:2 76:8 83:6,11	91:6 100:5	<b>cites</b> 83:10 94:2	<b>cleary</b> 5:17 6:5
93:21 94:1,4	<b>certify</b> 139:3	<b>citi</b> 127:12	55:2
97:23 98:3 105:13	<b>cetera</b> 14:18 18:7	<b>citing</b> 126:4	<b>client</b> 75:3 101:18
108:17 123:10,15	107:13	<b>city</b> 36:3 40:24	110:5
123:25 125:20,25	<b>ch</b> 2:2	128:8,10	<b>client's</b> 12:13
126:4,8	<b>chain</b> 30:23	<b>civil</b> 94:1	101:15
<b>call</b> 44:12 57:9	131:18	<b>claim</b> 10:23 16:7,8	<b>clock</b> 107:14
85:23	<b>chains</b> 8:22,24 9:9	26:16 57:17 71:14	<b>close</b> 37:5 104:23
<b>called</b> 8:13 35:16	<b>chance</b> 7:16 9:21	73:1,23 85:17	<b>closing</b> 105:16
112:13	<b>change</b> 21:18,23	91:1,2 92:15,21	<b>code</b> 94:1,2
<b>calling</b> 77:1	21:24 22:1,2	93:8 100:13	111:18
<b>cam</b> 57:9,11,13,18	70:10 119:20	101:12,13,14	<b>collaboration</b>
133:10 138:7	<b>changes</b> 79:21	102:10,19 103:2	109:3
<b>capable</b> 7:21	114:17	112:11 113:14	<b>collect</b> 56:8
<b>careful</b> 98:4	<b>changing</b> 60:6	116:9 119:20	<b>come</b> 26:5 37:20
<b>carefully</b> 130:23	<b>chapter</b> 45:6,16	120:23 121:3,3	95:10
<b>carryover</b> 11:7	48:22 49:2,18	123:1,14 134:4,9	<b>comes</b> 39:12
<b>case</b> 1:4 8:7,7 13:4	105:5,20	134:10,16,18,19	41:19 70:18
13:5 31:16 35:4,4	<b>charges</b> 57:9,11	<b>claimed</b> 72:21	<b>coming</b> 47:4 70:2
45:6,16 48:22	57:11,13	<b>claiming</b> 35:1	<b>commence</b> 113:23
49:2,18 51:25	<b>charts</b> 17:7	<b>claims</b> 112:10,10	<b>commenced</b> 49:18
53:3 64:6 69:13	<b>chase</b> 67:18	116:3	<b>commencement</b>
75:17 83:9,10,10	<b>check</b> 57:13,15,16	<b>clarification</b>	45:6,15 48:22
83:15 92:1 111:11	57:18	133:24	49:2 91:25
112:2 115:8	<b>checks</b> 8:3 15:12	<b>clarify</b> 34:4	<b>commentary</b> 8:21
123:17 126:3	19:3 28:15,17	<b>clause</b> 63:2	9:8,12 19:15
130:18	29:8 138:20	<b>clear</b> 8:11 16:18	<b>comments</b> 106:24
<b>cases</b> 76:9	<b>children's</b> 21:4	20:4 39:10 56:14	129:19
<b>cash</b> 57:14,16	<b>children's</b> 2:8,14	58:16 60:5 69:13	<b>commercial</b> 94:2
<b>catch</b> 78:18	2:20 3:3,10	76:8,9 77:13 80:9	<b>common</b> 112:6
<b>categories</b> 19:1	<b>choice</b> 9:13	82:2,13,24 83:7	<b>communicated</b>
46:17 57:8	<b>choose</b> 125:6	85:9 89:25 97:23	92:1 96:19
<b>cause</b> 25:1 58:18	<b>chooses</b> 122:6	100:20 103:23	<b>communication</b>
61:3 62:5 63:1	<b>chose</b> 43:15	107:11 109:20	49:5 78:8 82:25
67:10 69:25 70:21	<b>christmas</b> 128:15	110:2,4,16,22	130:2
105:3 117:17	<b>circulate</b> 136:13	119:13 120:23	<b>communications</b>
118:10 122:5	<b>circumscribed</b>	122:12,14 130:6	45:7,18,20 46:9
<b>causing</b> 125:4	83:13	131:14,20	48:23 49:8,10,18
<b>certain</b> 10:2 45:24	<b>circumstances</b>	<b>clearly</b> 8:13 9:20	105:12
55:14 106:5 124:1	116:5 124:1	58:8 83:11 90:20	

<b>company</b> 30:5 59:15,15 125:23	<b>compliant</b> 131:8 132:7,12	<b>confirm</b> 40:7 61:9	58:5,9 59:1,2,14
<b>compare</b> 108:15	<b>comply</b> 103:6	<b>conflicts</b> 56:22	59:16,18,19 60:1
<b>compensate</b> 57:4	109:7 130:5	<b>confused</b> 52:15,24 71:12	60:2 61:2 64:22
<b>compensation</b> 82:5	<b>complying</b> 107:2 129:23	<b>connected</b> 48:10	80:16,18,25 81:12
<b>complete</b> 24:1,3,7 24:21 25:4,15	<b>compressor</b> 48:9	<b>connection</b> 16:16 21:7 99:3 114:23 125:10	82:7 84:2,21 85:8
36:6 56:3 60:16	<b>comprised</b> 113:19	<b>consensual</b> 55:9	85:10,23 86:4,8
61:5 65:25 70:11	<b>computers</b> 48:11	<b>consensually</b> 87:16	87:21 88:1,11
74:2 80:12 83:22	<b>concede</b> 13:1	<b>consent</b> 107:9 132:3,9	89:2,20 92:4 95:8
89:2 103:4 106:23	<b>conceded</b> 130:6	<b>consequential</b> 56:8 103:2	95:22 104:16
115:1 116:19	<b>conceivably</b> 118:14 125:3	<b>consequently</b> 122:9 133:3	106:7,9,14,16,21
117:14,19 118:15	<b>concern</b> 10:6 135:6,9	<b>considerably</b> 102:1	107:8 108:23
119:6 120:7,13	<b>concerned</b> 98:17 98:20,21 121:5	<b>consideration</b> 124:1 127:7	112:13,22 113:1,2
122:6 125:6	123:12 124:21	<b>considered</b> 81:14	113:3,25 115:3,14
128:11 129:18	134:16 138:8	<b>considering</b> 97:19	116:11,15,18
<b>completed</b> 25:2 34:19 46:2,5	<b>concerns</b> 82:15	<b>consistent</b> 61:6 111:10 126:22	117:1,2,16,24
47:18 48:13,14	<b>conclude</b> 113:10 130:21	<b>constitute</b> 21:14 68:23,25 106:25	119:21,25 120:1,5
58:13,18 61:4,10	<b>concluded</b> 137:10	<b>constitutes</b> 130:20	120:18 121:12
61:12,13,20,21	<b>condensers</b> 48:16 48:16,19 65:2 66:1	<b>construct</b> 38:9 79:20 114:16 115:1	122:2 123:1
62:6 63:2 65:1,5	<b>condition</b> 51:2,3 70:11 82:6 103:9		128:22,24 129:6
69:25 88:9 98:22	103:24 132:25 133:3		129:10,15 130:9
102:5 116:7,8	<b>conditionally</b> 19:12		132:1 134:24
117:18 118:4,10	<b>conditions</b> 100:7 104:24		135:11,17 137:1
118:25 120:2,9,21	<b>conduct</b> 36:15 44:4 69:12,13		<b>construe</b> 97:25 120:4
120:25 121:1,18	74:22 75:18 76:5		<b>contact</b> 49:19 105:13,22
122:5,19 124:25	76:6,7 77:15		<b>contained</b> 51:25 115:1 128:17
125:4 128:19	78:23 79:6 83:12		<b>containers</b> 48:18
<b>completely</b> 72:13 72:14	92:9 93:17 126:19 127:8		<b>contemplate</b> 63:2 88:23
<b>completes</b> 58:14	<b>conducted</b> 80:19 106:10,10 129:2		<b>contemplated</b> 14:12 24:22 60:17 61:19 81:10 100:6 106:18 114:2 117:14 129:8,13
<b>completing</b> 46:22			<b>contemplating</b> 104:15 108:13
<b>completion</b> 12:6 24:16 48:5 59:2			<b>contended</b> 123:6
59:19 60:2 64:20			<b>contending</b> 73:8
66:19 89:20 91:20			<b>contends</b> 87:22 112:19,24 118:17 119:19 130:14,19
115:7,8 116:18			
117:2,22 120:20			
123:13 125:10			
<b>compliance</b> 115:2 131:16			

<b>contention</b> 118:21 121:10,21 125:18 132:20	<b>contrary</b> 13:3 76:7 83:19 93:22 128:17 130:21	39:8,23 40:4,8,11 40:14,25 41:9,11 41:16,22 42:6,8 43:10,11,14,20,25 44:10,11,13,14 47:7 49:7,8 52:2 52:10,11,14,17 53:6,10,14,15,18 53:19,21 54:1 59:6,23 60:4,14 61:22 62:3 63:7 63:14 64:11,16 65:9 66:6,21 70:19,22 73:20 74:5 75:4 77:25 77:25 78:1 87:3 103:7 108:6	88:22 93:20 94:6 94:10,18 97:24 98:4 107:7 118:19 118:19 123:9,10 124:2,8,13,22,23 125:14 126:1 128:25 131:25
<b>contested</b> 21:14	<b>control</b> 56:23 79:22 85:21 114:12,17 129:6		<b>court</b> 1:2,16 6:2,6 6:14,17,20 7:2,11 7:13,16,25 8:16 9:11,14,25 10:15 10:24 11:3,5,11 11:21,23,25 12:19 12:20 13:4,8,13 13:15,20,22 14:1 14:3,9,15,17,22 14:25 15:5,8,14 15:23 16:5,10,16 16:23 17:1,5,7,11 17:13,16,19,23 18:2,5,10,14,18 19:2,6,14,18,22 19:24 20:1,3,9,11 20:14,17,19,22 21:1,13,17,21,23 21:25 22:2,4,6,14 22:16 23:13,16,18 27:20 30:2,9 33:13,16,19,21 40:20,21 41:2,4 42:8 44:5,17,19 44:23,25 46:14,19 47:12 51:20 54:4 54:6,8,12,16,18 54:24 57:20 58:1 58:22,24 59:7,9 59:25 60:5,10,15 60:21,23,25 61:13 61:15,18,23 62:4 62:10,15,17,19,21 62:25 63:8,15,22 63:25 64:4,9,12 64:17 65:9,12,14
<b>context</b> 127:17	<b>controls</b> 56:20 123:11		
<b>continual</b> 92:2	<b>conversations</b> 82:21		
<b>continue</b> 24:6 25:7 46:3 50:6 82:3 95:15 96:24 98:8	<b>cooperate</b> 113:17		
<b>continued</b> 46:23 46:24 47:18 93:12 95:19 119:15	<b>cooperating</b> 109:6		
<b>continues</b> 55:7 94:24 128:16 129:2	<b>coordinate</b> 92:3		
<b>continuing</b> 37:22 46:3 97:12	<b>copied</b> 27:17		
<b>continuous</b> 45:21	<b>copies</b> 11:12 15:20		
<b>continuously</b> 49:12	<b>copy</b> 42:3	<b>correctly</b> 43:5 61:16	
<b>contract</b> 13:3,14 55:22 58:21 61:23 83:8,14 84:11,16 84:18 93:22 99:19 103:5 104:13,14 104:14 110:6 120:14 121:8,11 122:23 123:11 125:20,25 126:14 126:18,24 127:5,6 136:1,3,4,5	<b>corp</b> 6:3 127:13	<b>cost</b> 113:20 114:25	
<b>contract's</b> 126:13	<b>corporation</b> 1:10 2:1 133:20	<b>costs</b> 35:14,15,16 61:7 80:7 82:9 85:3 108:23	
<b>contracting</b> 63:17	<b>correct</b> 6:16,19 7:13 18:4,12 20:13 23:1,23,24 24:1,4,8,9,13,17 24:18 25:5,12,18 25:19,22,23 26:18 26:19 27:1,2,7,8 27:10,11,16 28:1 28:2,6,7,11,12,15 28:16,19,20,24 29:6,7,22,24,25 30:2,9,15,16,20 30:24 31:7,8,13 31:21 32:6,9,12 32:17,23 33:7,8 33:24,25 34:2,9 34:12,16,23 35:2 35:6,14,17,25 36:4,5,7,8,13,14 36:17,18,20,21,23 36:24 37:6,7,10 37:21,25 38:5,8 38:11,19,21 39:1	<b>could've</b> 101:22	
<b>contractors</b> 112:20		<b>counsel</b> 8:20,25 17:21 36:22 39:6 39:8,10 42:6 49:7 49:10 71:13 75:9 82:19 86:9 87:16 105:23,24 130:3 136:13,14 138:17	
<b>contracts</b> 8:11 13:7,12 82:2 126:7		<b>counsel's</b> 40:1 82:24 84:8 93:10	
<b>contradict</b> 69:14 83:8 124:9		<b>country</b> 139:21	
<b>contradictory</b> 90:4 98:5		<b>couple</b> 9:1 12:16 16:3	
		<b>course</b> 11:14,17 12:7 13:2,6,16 56:25 58:6 67:4 69:12,13 74:22 75:1,18 76:5,6,7 77:15 78:23 79:6	

65:19,21,24 66:8 66:10,14,22 67:3 67:14,19,21,24 69:16,18,24 70:4 70:15,17,21 71:8 71:11,24 72:1,4,7 72:11,18,20 73:1 73:3,6,8,15 74:4,7 74:10,12,14,16,25 75:2,7,19,23 76:1 76:11,16,19,23 77:3,19,23 78:12 78:17 79:8,14 80:25 81:4,7 83:11,15 86:6,14 86:23 87:1,7,10 87:12 88:3,10,16 88:21,25 89:11,17 89:24 90:3,8,10 90:13,15,25 91:8 91:10,12,16,18,23 92:11,16,21,24 93:3,6,15 94:4,12 94:19,22,25 95:6 95:12,25 96:2,5,8 96:10,21,25 97:8 97:10,13,16,20,23 98:2,24 99:2,7,13 99:17 100:2,5,13 100:19 101:1,13 101:20 102:3,9,11 102:16,23,24 103:8,13,16,19 104:3,11,20,22,25 105:2,4,8,11,15 105:25 106:2 108:9,11 109:4,18 109:20,23,25 110:7,9,12,15,25 111:3,9 118:12 119:13,19 120:13 121:16 122:12,21 123:25 124:12,21	125:17 126:6,12 127:13 131:20 133:14,21,25 134:5,14 135:5,8 135:15,17,22,25 136:8,12,17,21,23 137:6,8 138:6 <b>courtroom</b> 6:10 11:14 <b>courts</b> 98:4 108:17 123:25 <b>covenant</b> 56:7 83:2,7,12,16 104:9 108:19 113:15 125:19 126:6,12,16,20 127:3,9,17,19 130:20 132:17 133:6 <b>cover</b> 75:23 96:16 97:1 <b>covered</b> 11:9 45:24 46:17 48:6 56:3 61:9 66:7 90:24 99:11 <b>crazy</b> 84:14 <b>create</b> 84:11 <b>created</b> 111:17 <b>creates</b> 36:16 80:19 106:11 129:3 <b>critical</b> 56:15 114:8 <b>cross</b> 6:13 11:15 16:20 20:14 22:12 22:17 33:17 58:11 <b>crossed</b> 6:9 <b>crystal</b> 100:19 <b>cure</b> 2:7,12,18 6:8 10:9,23 13:24,24 14:2 16:7,8 18:22 18:24 21:7 33:4 55:23 56:24 57:3	57:9,10 58:2 62:12 69:7 73:13 74:6,13 75:8,10 75:14 86:19,20,21 87:17 89:1,5 90:19 92:11 93:7 101:1,2,4,11 102:9,17,18 110:5 110:17,23 111:20 111:21 112:1,5,7 112:8,9,9,10,11 113:5 119:19 120:23 121:5,6,21 122:8,9,14 123:14 133:8 135:25 138:7 <b>cured</b> 111:18 121:11 <b>current</b> 50:12,14 50:18 <b>currently</b> 116:10 <b>customers</b> 31:20 36:17 80:20 106:12 129:4 <b>cut</b> 13:18 67:18 <b>cutoff</b> 14:19 15:24 <b>d</b> <b>d</b> 1:24 3:5 6:1 24:19,21 60:15 66:9 73:23 88:7 90:24 100:20 117:13,21 118:19 119:23 120:4,10 121:9,20 122:1 123:5 125:5 128:10 138:1 <b>dam</b> 85:13 <b>damages</b> 56:8 85:6 89:4 90:19 101:8,9 103:2 104:5 110:10 <b>date</b> 12:7 13:20 14:19 15:24 29:21	29:24 41:9 49:1 115:7,8,9 139:18 <b>dated</b> 2:9,14,20 3:3,10 21:9,10 22:8,10 26:25 27:5,13,24 28:4 29:9,15 30:2,9 31:3 33:6 53:6 138:21,24 <b>dates</b> 120:9 <b>david</b> 5:15 10:25 <b>day</b> 86:5 107:14 <b>days</b> 9:1 12:16 41:5 57:24 59:13 81:14 87:2 106:22 108:3 116:23 129:17 131:9 <b>dead</b> 41:22,23 42:19 43:3,4,13 43:24 50:13 86:21 <b>deadline</b> 12:6,7 25:22,25 26:11 31:12 32:9 41:18 56:2 58:16 64:14 68:7,8 69:18 71:9 77:5,6 79:1,3,4,5 86:19,20 87:2 91:5,17 92:7 93:13 94:23 95:13 96:3,22 118:18 119:6 125:5,15 136:19 <b>deadlines</b> 82:16 106:5 122:19 123:22 124:21 <b>deal</b> 60:18 75:18 89:5 132:18 <b>dealing</b> 56:7 81:5 83:3,8 96:19 97:24 98:5 104:10 106:4 108:19 113:15 118:19,20 123:10 125:19
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[dealing - discretion]

Page 10

126:7,21 127:10 130:21 133:7 <b>dealings</b> 75:12 <b>deals</b> 107:5 <b>debate</b> 17:24 18:16 <b>debating</b> 18:8 <b>debtor</b> 108:22 113:14,22 134:15 136:14 <b>debtor's</b> 105:24 135:1,13 <b>debtors</b> 1:12 5:3,3 55:5 134:13 <b>december</b> 111:5 <b>decide</b> 16:21,23 17:2 <b>decided</b> 60:11 73:21 122:15 134:2 <b>deciding</b> 56:4 77:17 <b>decision</b> 68:8,11 71:2 77:7 94:4 <b>declarant</b> 6:9 8:7 9:19 11:15 17:11 <b>declaration</b> 2:17 4:1 8:6 12:17 15:11,13,22 16:20 17:10 18:25 20:4 20:5 21:9 22:8,10 26:15,24 27:4,18 27:23 28:9,14,22 29:2 30:13 31:2 33:2 35:6 39:1 40:14 41:8,11,16 43:7 65:6,7,10,17 65:22 66:11 72:16 89:14 93:1 105:10 105:21 138:21,23 <b>declarations</b> 20:1 21:2,6,11 54:17	<b>deem</b> 7:22 <b>deemed</b> 68:25 96:15 107:3 108:3 116:2 129:24 130:25 131:11 <b>default</b> 57:1,3,5 69:8 83:4 119:20 121:7 125:9,10 136:2,3,5 <b>defaults</b> 111:16 111:22,23,24 136:1 <b>defendant</b> 126:25 <b>definitely</b> 20:10 <b>definition</b> 127:8 <b>delay</b> 67:7 95:23 95:24 <b>delores</b> 26:3 <b>demand</b> 105:17 <b>demolition</b> 36:12 80:17 106:9,13,15 115:2,13 128:24 129:6,10 <b>demonstrated</b> 78:23 <b>denied</b> 122:10 138:9 <b>denies</b> 110:16 <b>deny</b> 133:8,11 <b>denying</b> 122:13 <b>depends</b> 66:16 113:24 <b>depose</b> 9:21 <b>deposed</b> 8:7 41:21 42:4 <b>deposit</b> 13:17 14:6 14:9,11 22:21 24:13 25:17 45:5 45:9,17,24 46:11 46:18 47:3 48:6 55:25 56:3 58:6 58:12 59:1,13,14 60:8 64:22 71:15	71:19 72:16 85:11 87:21,23 88:8,12 89:2,10,18 90:5 90:11,17 91:1,3 91:21 92:6 95:9 95:22 99:21 100:11,21,25 110:17,19 112:13 112:19,23 113:3 116:11,12,15,24 117:25 121:12,17 <b>deposited</b> 18:15 87:23 <b>deposition</b> 8:14 8:23,25,25 9:2,6 10:20 11:13 12:3 12:3,10,11,13,14 42:3,13 43:9,12 44:4,5 84:20 85:24 <b>deposits</b> 47:5 103:1 <b>described</b> 64:20 66:19 115:5 117:22 128:10 <b>describes</b> 89:18 <b>description</b> 138:5 138:12 <b>design</b> 16:4 24:15 59:2,18 60:2 89:19 115:1 116:17 117:1 <b>designatable</b> 2:5 <b>designated</b> 3:16 3:21 4:3 <b>detail</b> 18:23,25 29:4 37:14,18 <b>detailed</b> 37:9,9 81:10,21 106:19 106:23 108:9,14 129:13,18 130:8 132:14	<b>details</b> 107:12 109:10 <b>determination</b> 128:9 <b>determine</b> 19:10 122:23 <b>determined</b> 122:25 <b>develop</b> 83:24 113:8 <b>developed</b> 42:24 <b>development</b> 42:18 <b>devoted</b> 100:23 121:4 <b>die</b> 43:18 <b>died</b> 49:6 50:23 50:25 <b>different</b> 12:5 61:15 66:5 91:13 99:14 115:7,8 <b>differently</b> 72:2 109:15 <b>difficult</b> 124:12 <b>diligence</b> 7:17,20 <b>direct</b> 20:2 21:14 21:15,18 22:4,7 89:13 91:24 97:4 <b>direction</b> 9:20 17:12 39:13 <b>directly</b> 124:9 <b>disagreement</b> 67:22 <b>disastrous</b> 64:4 <b>disburse</b> 88:15 <b>disbursed</b> 117:25 <b>discovered</b> 12:16 <b>discovery</b> 8:6,13 9:21 10:16,17,18 10:21 11:10,12,21 14:5 15:24 <b>discretion</b> 79:20 114:15 127:6
---	---	---	--



<b>discretionary</b> 127:4 <b>discuss</b> 91:9 107:17 108:7 <b>discussed</b> 39:12 98:2 <b>discussing</b> 41:22 42:19 110:24 <b>discussion</b> 14:17 43:9 68:6 69:10 77:4,16 78:5,19 78:20,21 93:24 126:3 <b>discussions</b> 14:4,5 14:21 67:5 87:17 87:19 105:6 <b>disney</b> 126:8 <b>dispersed</b> 25:17 64:23 88:12 <b>dispute</b> 10:3 18:13 56:1,24 57:6,23 62:12,13 66:15 69:11 95:2 95:6 96:12,20 97:12 102:3 112:3 114:4 117:12 122:7,8,8 123:11 125:17 <b>disputed</b> 66:13 118:6 <b>disputes</b> 55:19 <b>disregard</b> 7:22 9:11 12:19,20 19:15 <b>disruption</b> 119:10 125:11 <b>district</b> 1:3 13:4 <b>doctrine</b> 96:11 <b>document</b> 7:4,6,7 7:8 10:2,4,9 11:10 18:21 26:7,9 27:9 29:1 81:23 114:24 138:18	<b>documents</b> 8:4,14 9:5 10:22 11:10 14:25 15:17,20 28:24 92:25 <b>doesn't</b> 119:23 <b>doing</b> 46:1 47:8 47:18 48:4 63:16 67:8 68:6 77:16 78:21 83:17 95:16 97:5,9 100:23 126:14 136:24 <b>dollar</b> 18:10,13 113:13,19 <b>dollars</b> 28:1 71:15 <b>dolores</b> 30:21 31:11,11 32:6 48:1,21 76:25 77:1 93:10 94:22 95:17 <b>double</b> 31:18 <b>doubt</b> 29:16,19 <b>drain</b> 1:24 <b>draw</b> 59:17 116:25 <b>due</b> 7:17,20 24:5 56:8 57:12 112:21 <b>duties</b> 131:7	<b>earlier</b> 10:9 30:20 134:1 <b>early</b> 32:22 <b>easements</b> 86:6 <b>easier</b> 23:4 <b>east</b> 2:9,15,21 3:4 3:11,17,22 4:4 11:2 21:4 55:12 <b>ecf</b> 2:5,10,15,21 3:6,13,18,23 4:5 12:25 15:11,22 18:22 23:4 81:2 105:10 <b>economical</b> 71:3 <b>ed</b> 125:24 <b>effect</b> 46:10 57:7 132:24 <b>effectiveness</b> 57:6 <b>efficiency</b> 75:21 <b>efficient</b> 77:8 <b>efforts</b> 36:2 128:6 <b>either</b> 8:24 49:20 59:14 68:21 75:10 115:24 116:1,2,3 123:3 133:5 135:22 <b>elect</b> 25:7 69:22 100:21 101:15,16 <b>elected</b> 70:25 74:1 122:1 <b>election</b> 25:1,6,9 58:17 61:3 62:1,5 62:9 63:1,4 69:20 69:21 70:21 100:22 117:17 118:7,8,13,15 120:6,8 122:4 <b>electronics</b> 48:11 <b>elements</b> 95:21 <b>elevator</b> 115:19 <b>elevators</b> 23:1,23 <b>eleventh</b> 8:14	<b>email</b> 96:22 99:23 100:7 130:3,7 131:18 <b>emphasize</b> 74:19 <b>employee</b> 119:4 <b>employees</b> 39:18 <b>enable</b> 59:17 116:24 <b>endeavor</b> 43:10 <b>ended</b> 12:11 <b>enforce</b> 68:21 76:13 <b>engage</b> 126:19 <b>engagement</b> 105:19 <b>enjoyment</b> 56:16 114:10 <b>enter</b> 25:21 114:5 133:9 138:6 <b>entered</b> 56:19 108:11 114:1 127:24 <b>entering</b> 105:5 <b>entire</b> 82:12 <b>entitled</b> 25:2 61:4 70:25 71:21 91:4 117:18 121:17 122:15 134:2 <b>entitlements</b> 40:24 44:9 55:15 56:10 85:25 86:5 <b>entry</b> 57:24 <b>equal</b> 120:9 <b>equipment</b> 34:2 <b>errors</b> 7:6,13 39:17 <b>escrow</b> 14:5,6,7 14:12,14,18 24:25 59:16,18,22,24 61:2 66:16 69:23 116:24 117:1,5,7 117:8,16 119:22 119:25 120:1,5
	<b>e</b> <b>e</b> 1:23,23 5:1,1 6:1 6:1 8:18,20,24 11:17 12:1 19:14 20:25 26:2,5,12 30:18,20,23 31:3 31:6,9,11,12 32:8 32:20 39:6 40:7 40:10,22 68:3,4,6 76:22,25 78:2,20 92:2,3 93:11,15 93:17,17,18 94:22 95:15 119:3 123:7 125:8,23 130:15 131:18 136:16 138:1,11,16 139:1		

121:4 123:1 <b>escrowee</b> 59:21 <b>esq</b> 5:7,15,22,23 <b>essence</b> 96:13 97:3 <b>essential</b> 62:20 <b>establish</b> 116:21 <b>established</b> 59:4 112:14,15 <b>establishment</b> 116:15 117:8 <b>estate</b> 119:4 127:13 134:16 135:13 <b>estimate</b> 22:21 24:13 25:17 45:5 45:8,17,24 46:11 46:18 47:2 48:6 55:25 58:5 59:1 59:14 64:22 85:10 87:21 88:11 95:9 112:13,22 113:1,2 116:11,15 117:25 121:12 <b>estimates</b> 72:14 <b>et</b> 1:10 2:1 14:18 18:7 107:13 <b>eve</b> 82:4 <b>event</b> 24:21 59:12 60:16 64:12 116:23 117:13 <b>evid</b> 138:12 <b>evidence</b> 6:21 7:7 7:21 8:10 9:3,4,8 9:10 12:24 13:6 15:3,17 19:13,17 19:20 22:9,11 27:19 40:19,21 51:24 52:2 53:4 54:13,18,22,23 62:14 63:9,15,19 64:2,5,8 68:2,3 88:1 92:19 97:25	122:17 123:16,20 124:8,22 125:14 126:1 134:19 <b>evidentiary</b> 6:11 11:5 54:20 73:12 <b>evidently</b> 130:23 <b>exactly</b> 13:13 17:11 25:23 50:5 66:10 90:10 <b>examination</b> 17:2 22:17 45:2 51:22 <b>examine</b> 20:14 <b>examined</b> 11:15 <b>example</b> 47:23 86:1 <b>exception</b> 126:17 <b>excess</b> 71:15 <b>exchanges</b> 138:16 <b>exclude</b> 17:16 <b>excludes</b> 123:16 <b>excuse</b> 19:16 20:11 123:17 129:5 <b>excused</b> 54:9 <b>exhibit</b> 6:23 8:2 8:18 10:1,8,11 15:9,21 17:18 18:21 19:8,9,20 20:6 26:23,23 27:4,23 28:4,9 33:1,2,13,18 35:20 37:1,12,19 56:12 58:7 76:24 78:5,7,8,10,10,11 78:11 79:17 80:4 80:18,23 81:20 82:12 105:24 106:10,13 108:14 115:4 128:25 129:5,9 130:11 131:17,22 <b>exhibits</b> 6:12,15 6:21 7:4 9:10,16	9:16 11:6 12:18 15:19 16:6 19:9 19:12,17 28:21,22 30:4 52:1 54:23 78:13,13,15,16 115:15 138:13 <b>exist</b> 123:3 <b>existing</b> 103:25 133:6 <b>exists</b> 125:20 126:7 <b>expectation</b> 127:8 <b>expectations</b> 127:11,16,18 <b>expense</b> 31:17 80:7 114:25 135:12 <b>expenses</b> 88:1 113:3 <b>expired</b> 40:25 57:7 <b>expiring</b> 41:6 <b>explain</b> 13:6,11 63:20 76:16 97:24 <b>explains</b> 13:10 124:10 <b>explicitly</b> 115:7 <b>express</b> 68:16 69:14 76:7,10,10 83:8,13,20,21 103:5 124:17,17 126:18,23 127:5 127:17 <b>expresses</b> 96:2 <b>expressly</b> 69:1 83:17 115:23 126:15,25 <b>extend</b> 68:18 <b>extending</b> 3:4,11 <b>extension</b> 68:16 <b>extensive</b> 113:6 126:3	<b>extent</b> 17:19 18:7 25:15 56:21 58:14 73:21 82:22 135:19 <b>exxon</b> 127:21
<b>f</b>			
<b>f</b> 1:23 20:25 139:1 <b>f.supp</b> 125:24 <b>face</b> 108:1 <b>facebook</b> 13:4 <b>faced</b> 131:4 <b>fact</b> 9:8 18:8 34:18 56:1,4,8 57:13 62:23 69:25 76:12 77:19 86:21 94:23 99:25 101:23 102:4 112:1 116:8 117:10 119:23 120:8,24 123:7 132:12,15 134:18 <b>facts</b> 62:19 67:19 82:23 118:21 132:15,19 <b>factual</b> 69:10 <b>failed</b> 56:1 <b>failure</b> 68:20 84:15 102:22 113:21 118:15 120:7,13 <b>fair</b> 56:7 57:16 62:20 67:20 83:3 83:8 87:3 99:18 104:10 108:19 110:15 113:15 125:19 126:7,21 127:10 130:21 133:7 <b>faith</b> 56:7 83:3,7 83:12,16 104:9 108:19 113:15 125:19 126:6,17 126:20 127:10			

<p>130:20 133:7  <b>familiar</b> 28:23  56:25 84:13  <b>far</b> 13:16 15:1,5  19:10 63:23 73:6  93:7 100:3 103:1  103:1 121:5  123:11,22 124:21  132:13,25 133:10  134:16 138:7  <b>fault</b> 55:22 108:5  <b>favor</b> 55:15 86:1  <b>façade</b> 23:1,22  24:23 48:13 60:20  60:25 115:18  <b>feature</b> 109:12  119:22  <b>february</b> 2:9,14  2:20 3:3,10 36:20  37:5 38:10 41:18  57:12,12 84:22  <b>feel</b> 74:20  <b>fell</b> 42:1  <b>fifth</b> 5:4  <b>figure</b> 18:11  113:19  <b>filed</b> 2:7,13,19  13:23 57:10  <b>filing</b> 87:19  105:20  <b>final</b> 18:20 87:2  115:12  <b>finalize</b> 51:6  <b>finally</b> 10:8 28:8  <b>financial</b> 108:17  <b>financing</b> 42:25  53:23,24 82:7  84:21 86:13 103:3  103:9 104:6  108:23 113:22  132:21  <b>find</b> 8:9 112:9  135:8,9</p>	<p><b>finds</b> 127:3  <b>fine</b> 18:18 20:3  33:19 44:25 64:9  70:8 78:17 96:6  96:23 136:23  <b>finish</b> 46:3 67:11  72:13 95:21  100:16,18 133:15  <b>finishing</b> 99:8  101:9  <b>fired</b> 49:20  <b>first</b> 8:5 11:5,16  12:3 21:9 31:9  43:8 45:4 52:13  52:19 53:5,7  55:24 57:9 58:5  58:24 59:14 67:19  68:2 69:19 76:5  79:16 95:23  112:12 113:24,24  117:12 118:18,22  119:22 120:4  122:1,3 123:4  131:3 132:6  133:10  <b>five</b> 57:24  <b>fixed</b> 123:1  <b>fixtures</b> 31:18  <b>floor</b> 51:9,9 53:17  81:22 85:21  <b>flux</b> 42:21  <b>fly</b> 108:24  <b>fold</b> 118:21  <b>follow</b> 131:13  133:3  <b>following</b> 56:18  95:20  <b>follows</b> 123:15  <b>folsom</b> 111:6  <b>font</b> 31:10  <b>foot</b> 15:14  <b>forbidden</b> 126:20</p>	<p><b>force</b> 96:13  <b>foregoing</b> 139:4  <b>forever</b> 78:24  <b>forfeit</b> 89:6  <b>forfeited</b> 87:23  88:9 89:10  <b>forfeiture</b> 90:4,22  91:13  <b>forgive</b> 110:2  <b>form</b> 12:18  122:17  <b>formal</b> 62:9 69:21  70:21 84:6  <b>formally</b> 136:12  <b>forth</b> 12:25 13:25  18:24 72:16 81:24  89:13 93:11 105:9  114:12,22 115:8,9  116:16 118:18  122:16 128:1  131:17  <b>forward</b> 8:22  55:17 56:9 62:14  82:17 84:23 96:9  109:2  <b>forwarded</b> 8:20  9:6 12:9  <b>forwarding</b> 12:19  12:20  <b>forwards</b> 40:6  <b>found</b> 7:23,24 9:5  24:11 49:21,22  81:1  <b>four</b> 61:20 89:21  118:25  <b>frame</b> 66:5,7  <b>frames</b> 67:14  <b>frankly</b> 10:5 69:9  78:3,8 82:6 109:8  136:23  <b>freight</b> 23:1,22  115:19</p>	<p><b>friday</b> 7:18 8:5  9:18 29:13  <b>front</b> 55:8 108:22  <b>full</b> 100:11,14  <b>fund</b> 24:24 51:15  59:16,18 61:2  117:1,25 119:21  119:25 120:1,5,19  120:19 122:2  123:1 135:11  <b>fundamental</b>  73:12 98:12  <b>funded</b> 116:16  <b>funding</b> 51:7 54:2  <b>funds</b> 24:24 50:25  57:25 58:16 59:17  61:1,25 64:22  69:19,21 70:25  89:15 116:25  117:4,10,15 118:7  118:9 119:24  120:5 121:3  <b>further</b> 44:15  49:17 54:3 82:19  111:1 115:10  126:13 131:14  <b>future</b> 62:13  101:7 113:4 122:9</p>
			<p><b>g</b></p>
			<p><b>g</b> 6:1 138:3  <b>gain</b> 108:17  <b>gallagher</b> 4:25  139:3,11  <b>gather</b> 60:11  <b>general</b> 8:9 22:23  83:19 110:19  126:16,22  <b>generally</b> 123:15  <b>getting</b> 43:1 47:9  47:19 49:20 70:12  103:19,19 107:21  <b>give</b> 44:22 51:12  51:15 84:14</p>



[give - honor]

Page 14

<p>100:16 109:7  <b>given</b> 9:18 12:10  59:21 68:24 92:16  118:15 120:6,13  120:19 124:16  126:25 130:24  132:15,17 135:10  136:1,3  <b>gives</b> 97:3 108:16  <b>glance</b> 7:6  <b>go</b> 11:25 23:2  30:23 35:11 51:4  51:11 53:20,22  55:17 59:5,9 66:2  67:17 68:5 70:25  71:8 72:5 75:16  76:7,10,16 80:4,8  82:17 84:23 90:3  93:25 94:19 95:6  96:9 98:12 104:21  104:22 106:13  109:11 125:22  <b>goal</b> 32:22  <b>goes</b> 31:15 65:14  95:9 106:2 117:21  119:7  <b>going</b> 12:23 17:1  26:5 37:14,15  38:3 42:15 45:7  49:15,23,25 51:12  54:20 60:18 67:9  67:16,18 75:18  77:11,11 85:25  93:12 95:14 96:23  100:3 135:2 137:1  <b>good</b> 6:2,4,6 10:25  11:3 12:2 20:24  22:19,20 55:8  56:7 83:3,7,12,16  95:16 102:12,12  104:9 108:19  113:15 125:19  126:6,16,20</p>	<p>127:10 130:20  133:7  <b>gotshal</b> 5:2  <b>gotten</b> 34:5  <b>gottlieb</b> 5:17 6:5  55:2  <b>govern</b> 115:9  <b>governed</b> 109:16  125:20 126:7  <b>governing</b> 13:2  127:18  <b>government</b> 128:7  <b>governmental</b>  128:20  <b>grand</b> 5:11  <b>grant</b> 126:18  127:6  <b>granted</b> 89:7  <b>granting</b> 133:9  138:6  <b>great</b> 31:19  <b>ground</b> 51:9,9  53:17 85:21  <b>groundwork</b>  113:21  <b>group</b> 2:9,10,15  2:15,20,21 3:4,4  3:11,11 11:2,2  21:4,5  <b>guess</b> 66:14 71:11  125:22 135:1</p>	<p><b>happened</b> 14:18  51:11 95:23 108:4  <b>happening</b> 45:21  58:3  <b>happens</b> 88:8 95:3  122:7  <b>happily</b> 58:23  <b>happy</b> 6:12 75:21  76:21 87:4  <b>hard</b> 43:1 102:2  103:17 108:19  <b>hate</b> 42:20,20  <b>hazardous</b> 81:6  106:17 129:11  <b>head</b> 79:25  <b>hear</b> 13:15 15:2  16:23 54:10,24  75:20 96:17  102:21 109:19  <b>heard</b> 17:21 54:14  58:11 63:10 82:20  85:20,22 97:18  <b>hearing</b> 2:4,7,12  2:17 3:1,8,15,20  4:1 20:6 54:21  <b>heart</b> 42:23  <b>heights</b> 42:18  <b>held</b> 14:6 60:8  83:16 85:16  116:10,12 117:5,6  121:4 122:3  <b>hell</b> 42:24,25  <b>help</b> 50:3  <b>helpful</b> 15:15  103:15  <b>hereof</b> 115:4  <b>hereto</b> 68:17,19  68:25 80:18 106:9  107:6 115:3,15  128:24 131:24  <b>hereunder</b> 131:24  <b>highly</b> 108:9  135:10</p>	<p><b>hired</b> 101:22,23  <b>history</b> 39:17 94:2  <b>hold</b> 49:20 50:11  52:20,22 53:11  <b>holdco</b> 3:15,20  4:2 5:18 111:12  <b>holding</b> 62:2  <b>holdings</b> 1:10 2:1  6:3 133:20  <b>holes</b> 132:13  <b>hon</b> 1:24  <b>honor</b> 6:4,8,12,16  6:19 7:1,3,10,19  7:20 8:1,4,11,17  8:19,23 9:2,7,9,13  9:15,23 10:4,14  10:18,21,25 11:4  11:15,22 13:21  14:8,11,20 15:4,7  16:17,20,25 17:3  17:18,25 18:12,17  18:20 19:21,23,24  20:13,16,24 22:12  22:13,15 23:12  33:15,20 44:6,16  44:20,21 46:12,13  47:10 48:8 51:21  54:3,5,10,15 55:1  55:4,10,11,17,20  55:24 56:2,6,11  56:19,23,24,25  57:5,8,15,18,21  58:3,4,6,8,10,20  58:23 59:6,23  60:20 61:12,17  62:3,7,11,23,24  63:7,14,18,20,21  63:23 64:7,11  65:7,20,23 66:6  66:13,21 67:1,2,4  67:13,20 68:1,5  68:11,15 69:2,4,7  69:12,15,17,23</p>
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[honor - invoice]

Page 15

70:3,14,19,23 71:1,3,6,10 72:5 72:25 73:13,20,25 74:5,8,18,20,23 75:6,17,21 76:3,9 76:15,18,20,21 77:1,13,15 78:1,1 78:2,7,16,19,22 79:3,11,15,16,18 79:24 80:3,5,8,14 80:21,23 81:5,16 81:19,21,23 82:1 82:6,8,10,12,13 82:18,21,25 83:1 83:2,6,9,21,25 84:3,7,12,14,17 84:20,23 85:1,5 85:14,19 86:1,3 86:11,12,15,17,18 86:25 87:3,4,6,9 87:15 88:5,7 91:24 94:16 96:17 97:17 102:21 103:7 109:22,24 110:1,3,4,10,20 110:21,23 111:2,8 133:13,19 135:21 136:15,18 137:3,5 137:7 <b>honor's</b> 85:8 <b>hook</b> 84:15 <b>hope</b> 43:1,16 86:17 136:24 <b>hoped</b> 43:18 <b>hopefully</b> 37:4 105:3 <b>hour</b> 8:15 80:15 <b>hours</b> 36:10 81:12 106:6,20 107:8 128:22 129:15 130:9 132:1 <b>house</b> 130:3	<b>huh</b> 22:16 106:1 <b>hva</b> 48:12 <b>hvac</b> 22:25 23:21 24:23 31:16 32:12 47:23 48:2,7,9,13 48:15 60:18,19 65:2,24 66:3 77:23 95:23,24 98:13,17,18 99:8 99:24,25 101:22 101:23 115:18 125:10 <b>hypothetical</b> 121:22 <b>i</b> <b>i.e.</b> 111:16 116:19 <b>idea</b> 77:14 81:23 82:3 84:17 85:6 101:25 <b>identified</b> 79:10 80:5 <b>ignore</b> 107:16 <b>illusory</b> 108:8 <b>illustrative</b> 15:10 17:9 <b>imagine</b> 10:22 102:3 <b>immediate</b> 113:6 <b>immediately</b> 12:9 <b>implementation</b> 109:12 <b>implication</b> 127:16 <b>implied</b> 83:19 104:9,12 108:18 113:15 125:19 126:6,12,20,23 127:2,9,16,19 130:20 132:16 133:6 <b>important</b> 68:20 76:4 82:2 127:12 127:16	<b>importantly</b> 56:2 82:10 84:17 <b>improper</b> 8:12 9:7 9:24 55:20 101:8 <b>improvement</b> 88:1 <b>improvements</b> 35:25 79:21 114:16 128:4,8,11 <b>inability</b> 103:3 <b>inaccuracy</b> 18:3 <b>include</b> 81:10 106:18 129:12 130:8 <b>included</b> 81:24 93:24 <b>includes</b> 59:7 66:1 89:21 90:22 <b>including</b> 89:22 93:18 108:16 111:23 114:12,19 115:4 125:7,21 126:8 128:1 <b>inconsistent</b> 82:22 94:10 <b>inconvenience</b> 36:17 80:20 106:12 129:4 <b>incorporate</b> 104:18 <b>incorrectly</b> 87:22 <b>incumbent</b> 107:20 <b>incurred</b> 52:10 92:19,23 113:20 <b>indicate</b> 87:15 <b>indicates</b> 79:1 132:6 <b>indiscernible</b> 34:18 72:8 <b>indulge</b> 110:2 <b>influence</b> 12:23 <b>information</b> 9:22	<b>initial</b> 107:21 <b>inside</b> 48:16 96:1 <b>inspection</b> 64:21 66:22 117:23 <b>inspector</b> 44:13 85:23 <b>install</b> 66:1 79:21 114:16 <b>installed</b> 48:10,14 48:17 65:2 128:19 <b>instance</b> 113:25 <b>instruction</b> 59:21 <b>instrument</b> 68:18 <b>insurance</b> 59:15 59:15 125:23 <b>integrated</b> 13:7 13:11 123:18 <b>integration</b> 115:21 <b>intended</b> 72:17 <b>intending</b> 12:22 <b>intent</b> 16:2 <b>interest</b> 111:5 <b>interfere</b> 79:22 114:17 <b>interference</b> 98:18,21 <b>interpretation</b> 123:12 125:25 <b>interrupt</b> 74:25 105:25 <b>introduced</b> 59:4 <b>introductory</b> 58:24 89:18 123:3 <b>invasive</b> 83:24 <b>invested</b> 127:4 <b>investors</b> 43:9,14 43:19,21,23 44:1 <b>invoice</b> 26:24,25 27:5,6,13,17,24 27:24 28:4,10 32:24 33:3,9,23 34:16,23 35:2
---	--	--	---

[invoice - landlord]

Page 16

52:13,19 53:5,7 63:12 71:4 73:14 73:17 93:4 122:18 <b>invoiced</b> 16:19 <b>invoices</b> 8:3 10:12 15:12,25 16:1,10 19:2 26:16 28:13 28:14,17,18 29:6 29:8,15,21 30:1,4 30:5,7,9,14 34:3 52:2,4,10 54:21 66:12 79:3,4,5,10 92:25 93:1 102:4 118:22 125:2,2 138:20 <b>invoke</b> 83:2,7 <b>invokes</b> 56:6 <b>involved</b> 93:12 <b>involves</b> 124:3 <b>involving</b> 106:16 129:11 <b>irrelevant</b> 17:14 77:15 <b>irrevocable</b> 2:8,14 2:19 3:3,10 21:4 <b>island</b> 125:23 <b>isolation</b> 68:14 <b>issue</b> 6:11 8:22 9:8 11:18 13:16 14:18 38:7 51:6 55:11,19 67:15 79:16 86:7,12 89:5 90:19,20 91:13 101:1,2,4 102:25 109:17 122:22,23 124:12 134:14,17 <b>issued</b> 40:24 111:10 128:12 <b>issues</b> 11:8 18:2 39:14 40:3 112:9 113:24 114:4 126:4 134:25	<b>izek</b> 2:8,13,17,19 3:2,9 4:1 20:21,25 21:3 22:8,10 49:24 50:2 138:21 138:23 <b>j</b> <b>jacqueline</b> 5:7 133:20 <b>jamie</b> 4:25 139:3 139:11 <b>january</b> 32:16 33:3,6 57:10 77:12 <b>jb</b> 42:1 <b>job</b> 37:15 47:17 66:1 <b>joint</b> 6:15,21 26:23 27:3,22 28:9 33:1,18 35:20 36:25 43:10 56:12 58:7 59:21 79:17 80:4 81:19 82:11 105:24 138:13 <b>jonathan</b> 36:22 37:4 39:6 <b>judge</b> 1:25 34:20 48:8 <b>july</b> 20:4,10 21:10 22:10 43:7 138:24 <b>june</b> 8:7,23 10:20 11:13 13:18 14:19 41:20 42:4 84:22 95:18 <b>jury</b> 12:22 <b>k</b> <b>k</b> 20:25 <b>kate</b> 5:23 <b>keep</b> 44:9 68:11 77:1 82:23 85:25 88:19 90:17 95:16 101:2,15	<b>keeping</b> 89:1 <b>kept</b> 49:23 <b>key</b> 55:16 111:20 <b>kind</b> 51:14 88:20 108:8 <b>knew</b> 51:5 107:18 <b>know</b> 6:23 7:18 10:4 14:3 18:6 23:4 34:8,10,25 37:1 40:8 42:9 49:7,25 51:16 52:3 55:4 63:2 64:13 66:25 71:14 72:1 74:22 85:14 89:24 90:25 92:25 95:19 96:8 97:1 98:7 101:10,22 102:2,2,12 104:6 104:20 109:9,13 109:14 110:3 134:17 135:15,18 135:24,24 136:6 136:23,24 <b>knowing</b> 21:13,18 92:12 <b>knowledge</b> 124:5 <b>knows</b> 63:24 85:12 <b>kupetz</b> 5:9,15 10:25 11:1,4,22 12:1 13:9,14,19 13:21 14:2,8,10 14:12,16 15:4,7,9 15:19 16:1,9,11 16:25 17:4,6,8,15 17:17,21 18:20 19:4,21,24 20:8 20:10,13 44:20 45:3 46:15 47:1 47:13,14 51:19 54:5,17 60:7,14 61:22 63:23 64:2 65:11,13,15,17	67:4 71:23,25 72:3,5,9,12,19 87:9,15 88:4,7,14 88:17,22 89:7,12 89:23 90:2,6,9,12 90:14,24 91:6,9 91:11,14,17,19,24 92:14,18,22 93:2 93:4,9,16 94:16 94:24 95:4,8,14 96:1,4,6,9,17,23 97:6,9,11,14,17 97:22 98:1,16,25 99:6,10,16 100:1 100:4,9,15,23 101:12,18 102:8 102:10,14,21 103:7,12,14,18 104:2,8,19,25 105:3,5,9,12 106:1 108:6,10,25 109:18,22,24 110:8 137:9 <b>l</b> <b>l</b> 138:3 <b>l.a.</b> 8:23 <b>la</b> 80:11 <b>labeled</b> 6:22 <b>labor</b> 30:12 66:1 <b>lack</b> 85:2 <b>laid</b> 49:21 50:1 97:20 128:15 130:23 132:15 <b>landlord</b> 3:2,9 5:10 6:9 7:7 8:2 8:18,20 10:1 11:1 11:19 12:4 13:23 16:14,14 18:16 19:9 21:5 23:21 23:25 24:12,21 25:3,15,20,24 26:9,16 28:3,22 35:13 45:8,17,23
--	---	---	--

46:9,10 47:8,15 47:21 48:23 49:10 50:6 54:21 55:7 55:15,21,24 56:1 56:6,9,13 57:11 57:14,25 58:9,14 58:19 59:17 60:12 60:16 61:5,7 63:4 63:23 64:13,17,23 67:1,5 69:5 70:5 70:23 71:14 72:13 72:14 73:22 75:8 76:24 78:4,15,16 78:24 79:20 80:6 81:8,16 82:8 83:23,25 84:20 85:2,20 86:7 87:22,23 88:12,12 88:15 89:14 90:16 91:1,4,20,22 92:1 92:4,5,9,20 97:6 97:11 99:10 100:9 100:17 101:23 102:4 103:23 105:6,14 106:15 107:1,12 108:16 110:11 111:13,24 112:4,12,19,25 113:3,5,13,17,18 113:20 114:25 116:12,16,25 117:5,8,11,14,19 117:25 118:6,17 118:23 119:1,4,5 119:5,14,14,19,23 121:13,16,24 122:24 123:6 125:7 128:3,6 129:7,9,22 130:1 130:14,17,18,19 131:5,6,8,12,13 133:3 134:2,12 135:19 136:3,13	138:15,17 <b>landlord's</b> 6:23 7:3 9:16 11:6 15:9 19:12,17,20 21:3 24:15 54:23 56:18 59:2,13,18 60:2 64:19 66:19 70:4 72:15 78:5 80:10 84:3,5 89:19 91:7 91:14,19 92:22 105:17 106:23 110:17 112:7,8 113:22 114:25 116:17,19,23 117:1,22 118:15 120:20 121:10 122:9,13,15 125:18 129:18 132:23 135:20 138:7 <b>landlords</b> 114:16 <b>landlord's</b> 3:20 4:2 <b>landscaping</b> 78:6 <b>language</b> 68:20 69:2,9 76:4 94:3 100:20 <b>late</b> 15:1 79:6,8 <b>latest</b> 32:24 <b>law</b> 13:1,2,5 69:13 76:8 83:5 93:21 97:24 123:10 125:20,25 126:4,8 128:19 <b>lawyer</b> 40:2 82:20 105:13 <b>lawyers</b> 87:10 <b>lay</b> 69:16 113:20 115:16 <b>laying</b> 132:13 <b>lays</b> 80:6 104:16 111:19	<b>leading</b> 46:12 47:12 <b>lease</b> 3:6,12,16,21 4:3 6:7 21:8 55:13 56:12,20 57:2,19 74:8 79:17 86:2,7 103:11,11 106:4 108:12,15 111:4,5 111:12,16,17,23 112:15,25 113:11 113:16 114:1,5,7 115:24 116:1,4 117:13 119:2,17 119:21 125:21 127:24 130:24 134:10 <b>leases</b> 2:5 55:5 57:6,6 126:8 <b>leave</b> 72:15 <b>leaves</b> 121:9 125:8 <b>left</b> 46:3 48:15 58:15 <b>legal</b> 14:23 31:23 31:23,24 32:1,5 48:3 75:4 86:16 93:12,13,24 139:20 <b>legitimate</b> 92:15 <b>lender</b> 50:24,24 51:3,15 <b>lengthy</b> 94:4 108:13 <b>lennar</b> 125:22 <b>leo</b> 32:19 <b>letter</b> 36:22 37:4,8 38:11,21,22,25 39:7,11,22 40:6 51:17 81:20,21 82:11 84:4,24 104:23 105:14,15 105:23 107:14 <b>letterhead</b> 84:7,25	<b>liable</b> 7:22 64:18 <b>liberty</b> 5:19 <b>lifetime</b> 41:1,24 <b>light</b> 32:11 77:6 125:9 127:24 <b>limbo</b> 49:25 <b>limit</b> 76:21 100:22 101:17 <b>limitation</b> 114:19 115:4 118:12 125:7 128:1 <b>limitations</b> 126:11 <b>limited</b> 110:23 <b>limiting</b> 98:4 124:18 <b>line</b> 42:15 109:1 138:5 <b>liquidated</b> 89:4 90:19 101:8 <b>lisa</b> 4:25 139:3,8 <b>list</b> 6:23 19:9 58:8 58:13 <b>listen</b> 13:15 <b>literally</b> 42:20 71:6 <b>little</b> 6:11 7:24 23:4 41:14 52:15 52:24 63:9 71:11 134:1 <b>live</b> 109:5 <b>llc</b> 2:9,10,15,15,20 2:21 3:4,4,11,11 5:18 21:4,5 <b>llc's</b> 3:15,20 4:2 <b>llp</b> 5:2,17 <b>loan</b> 51:7,15,16 <b>located</b> 3:17,22 4:4 12:12 111:6 <b>location</b> 111:7 <b>lodges</b> 107:5 131:23 <b>logically</b> 101:3
--	---	---	--

[longer - morning]

Page 18

<b>longer</b> 73:22 <b>look</b> 7:20 8:19 11:11 23:3 26:20 26:22 28:8 30:18 31:25 32:14 33:11 34:13 35:5,19 37:12 39:5 58:10 65:15 68:13,13,14 76:21 78:5 79:16 80:23 81:2 84:21 88:4 100:2 101:14 104:7 <b>looked</b> 79:3 <b>looking</b> 7:3,21 22:23 27:17 37:25 38:2,2 53:2 65:21 82:7 103:16 <b>looks</b> 95:16 <b>los</b> 3:17,22 4:4 5:13 21:8 36:3 40:24 55:12 78:4 111:7,9 128:9 <b>losing</b> 56:10 <b>loss</b> 57:4 <b>lost</b> 86:22 <b>lot</b> 42:25 69:10 82:20 <b>louder</b> 45:12 <b>love</b> 48:8 <b>low</b> 22:25 23:21 24:23 60:19 115:17	136:16 138:16 <b>mail's</b> 31:3 <b>mails</b> 8:18,20 11:17 12:1 19:14 78:2,20 93:11,18 95:15 <b>main</b> 101:15 <b>maintained</b> 100:16 <b>maintenance</b> 112:6 <b>majority</b> 48:14 55:5 <b>making</b> 77:7 90:13 <b>manges</b> 5:2 <b>manner</b> 25:16 36:16 64:21 66:20 70:11 79:23 80:19 106:11 114:18 117:23 120:2 129:3 <b>march</b> 51:16 <b>marcus</b> 5:7 133:13,19,20,22 134:1,6 135:1,6 135:14,16,21,24 136:7,11 <b>mare</b> 125:23 <b>massey</b> 5:23 <b>material</b> 16:11,13 <b>materials</b> 8:8 81:6 106:17 129:12 <b>matter</b> 1:8 6:8 8:9 8:12 9:10 21:15 69:4 73:12 83:19 120:18 123:9 <b>matters</b> 14:23 130:4 <b>mean</b> 16:6 17:21 33:10 48:21 50:23 60:10 63:5 65:5,6 75:23 76:1,13	88:25 89:5 92:19 97:1,20 101:14 102:19,24,24 103:17 104:13,22 108:12 109:10 110:18 135:23 136:8 <b>meaning</b> 66:16 94:7 123:12,15 <b>means</b> 108:2 115:10 <b>meant</b> 103:25 <b>mechanism</b> 129:7 131:6,7 <b>meet</b> 40:2 56:1 58:16 64:14 81:16 82:20 84:9,10 <b>meeting</b> 49:12 <b>meetings</b> 78:4,10 78:11 92:3 <b>mention</b> 39:19 52:12 <b>mere</b> 9:8 <b>merely</b> 124:10 132:6 <b>meruit</b> 75:11 102:19 120:16,18 121:2 122:22,24 134:4 <b>message</b> 12:20,21 <b>messages</b> 12:9,12 12:15 <b>met</b> 49:15 68:8 94:23 95:17 119:5 <b>microphone</b> 72:7 <b>mid</b> 49:2 <b>middle</b> 33:11,23 34:13 <b>million</b> 24:13 27:1 28:1 58:12 59:1 71:15 89:18 113:13,19 134:23	<b>mind</b> 32:2 44:21 52:24 <b>mineola</b> 139:23 <b>minimal</b> 80:19 <b>minimally</b> 83:24 <b>minimum</b> 36:16 106:11 129:3 <b>minute</b> 52:15 <b>misheard</b> 17:22 <b>missed</b> 31:12,22 32:9 95:12 96:2 96:22 <b>missing</b> 82:16 <b>modification</b> 94:9 124:13 <b>modified</b> 12:7 13:10 88:24 97:15 118:18 <b>modify</b> 13:3,8,9 93:22 94:18 <b>moment</b> 110:2 <b>monday</b> 53:25 <b>monetary</b> 111:17 111:22 121:7 <b>money</b> 13:17 17:25,25 18:8,8 58:19 62:24 67:24 70:7,12,18 85:14 88:18,19,21 101:5 101:16 116:10,24 123:7 <b>month</b> 26:8 41:3 49:24 79:11 <b>months</b> 36:3,6 38:19 39:20 41:18 73:16 80:11,13 81:25 82:5,17 84:5,25 105:16 128:8,12 <b>morning</b> 6:2,4,6,7 10:25 11:3 20:24 22:19,20 87:6 133:23
<b>m</b>			
<b>m</b> 20:25 125:23 <b>mail</b> 8:24 26:2,5 26:12 30:18,20,23 31:6,9,11,12 32:8 32:20 39:6 40:7 40:10,22 68:3,4,6 76:22,25 92:2,3 93:15,17,17 94:22 119:3 123:7 125:8 130:15 131:18			



[motion - okay]

Page 19

<b>motion</b> 21:7 <b>move</b> 44:6 74:18 74:20 75:22 80:3 109:2 <b>moved</b> 56:9 <b>moving</b> 31:18 <b>multi</b> 108:12 113:13,19	<b>neither</b> 63:25 105:17 <b>never</b> 11:18 14:13 83:20 96:19 108:4 117:6,7,8 127:9 <b>new</b> 1:3,18 5:5,20 72:2 103:25 104:4 133:4 135:19,20 <b>noise</b> 36:16 80:20 106:12 129:3 <b>non</b> 81:6 109:6,8 109:11 132:7,12 <b>nonresidential</b> 3:6,12 <b>nonresponsive</b> 67:12 <b>normally</b> 89:5 <b>north</b> 27:1,25 <b>note</b> 33:12 64:7 121:16 132:20 136:18 <b>noted</b> 115:19 116:14 118:3 123:2,19 125:17 126:12 127:23 <b>notice</b> 2:4 81:9,9 106:15,18,23 111:11,12,13 129:10,13,18 131:23 <b>notified</b> 39:20 <b>notwithstanding</b> 128:16 <b>november</b> 95:18 <b>number</b> 8:4 12:12 12:25 15:12 26:16 26:23,23,25 27:4 27:6,23,24,25 28:4,5,9 32:20 33:1,18 35:20 36:25 37:1 57:13 58:8 79:17 81:20 114:3 125:1	<b>numbered</b> 27:14 28:10 <b>numbers</b> 37:17 <b>ny</b> 5:5,20 139:23 <b>o</b> <b>o</b> 1:23 6:1 20:25 20:25 139:1 <b>oath</b> 29:5 41:21 <b>object</b> 111:14 131:9 <b>objected</b> 6:24 61:17 <b>objection</b> 2:7,12 2:18 6:8 10:10 13:24,24 15:1,24 17:22 18:22 21:3 21:7 33:4 46:12 55:23 57:10 62:12 69:7 73:2,13 74:13 75:8,10,14 86:19,20,21 92:12 101:11 102:9,17 102:19 110:17 112:7,8 113:6,13 121:5,21 122:14 124:6,7 133:8,9 136:1 138:7 <b>objections</b> 11:5 55:7 57:9 58:2 87:17 106:24 107:6 122:10 129:19 131:23 <b>obligation</b> 68:19 81:17 83:5,23 84:11 103:5,5 104:3 111:17 116:19 121:6 131:22 132:8 133:5 <b>obligations</b> 24:16 56:21 59:3,4 84:9 84:10 89:20 110:6 110:22 111:15,22	116:18 <b>obstruct</b> 79:22 114:18 <b>obtain</b> 128:6 <b>obvious</b> 95:1 <b>obviously</b> 7:20 66:10 93:11 134:15 135:6 <b>occasions</b> 124:3 <b>occupied</b> 55:11 113:9 <b>occupying</b> 51:8 <b>occur</b> 51:1 <b>occurred</b> 52:16 87:19 92:6 93:23 120:8 121:23 <b>october</b> 49:3 84:13 <b>offer</b> 40:3 77:17 82:5,19 <b>offered</b> 39:11 40:1 <b>offering</b> 39:13 <b>oh</b> 108:20 <b>okay</b> 6:20 7:2,25 8:16 9:14,25 10:15,24 11:25 15:4,8 16:5,24 17:15 18:14 19:22 20:3,14 21:1,21 22:6,14 23:9,17 23:18 26:20 27:3 28:13 29:21 30:23 31:4,6 32:8,14,19 32:24 33:19,21 35:19 38:15,23 39:5 41:13 43:7 44:17 45:13 53:16 54:4,6,16,19,24 57:20 58:1 60:15 60:25 61:23 63:22 64:12 72:8,11,20 74:10,15 75:25 77:3 79:14 87:7
---	---	---	---

[okay - passed]

Page 20

87:11 90:14 97:16 99:15 103:16 105:2,4 109:25 111:3 133:18,25 135:14,21 136:7 136:10,17,21 137:6 <b>old</b> 102:10 139:21 <b>olympic</b> 3:17,22 4:4 55:12 111:8,9 <b>omit</b> 16:2 34:21 <b>once</b> 49:18 50:24 87:19 <b>one's</b> 19:7 28:5 <b>ones</b> 17:4,18 38:24 <b>ongoing</b> 45:18 67:5 93:20 99:11 <b>operate</b> 82:3 <b>operating</b> 73:22 <b>operation</b> 56:15 70:10 114:9 123:4 <b>operations</b> 119:11 <b>operative</b> 56:12 104:17 <b>opinion</b> 126:4 <b>opportunity</b> 111:14 124:6 <b>opposed</b> 39:13 <b>opposite</b> 15:16 <b>option</b> 70:23,24 <b>optionality</b> 68:11 <b>oral</b> 54:24 <b>order</b> 3:1,8 56:7 57:24 60:19 109:2 115:17 133:9 134:7 136:12,20 138:6 <b>ordered</b> 3:1,8 <b>orders</b> 57:24 111:10 <b>original</b> 13:24 33:4 57:10 113:5	<b>originally</b> 112:15 <b>outlined</b> 70:20,22 <b>outlining</b> 39:14 <b>outside</b> 48:9 <b>outstanding</b> 55:7 67:10 111:15 <b>overall</b> 50:21 113:7 128:5 <b>overarching</b> 85:5 <b>overcollateralizati...</b> 72:24 <b>overcome</b> 124:24 <b>owed</b> 34:7 47:17 110:11 111:21 112:1,2 122:24 134:11 <b>owing</b> 112:21 134:22,24	99:14,18 102:4,7 112:18,22 116:12 119:21 120:18 122:16 123:8 134:3 136:5 <b>pamela</b> 4:25 139:3,14 <b>papers</b> 76:2 83:10 94:17 97:18,20 100:10 104:19 109:19,20 <b>paragraph</b> 15:11 15:21 24:10 31:22 32:15 35:19 56:14 58:10,25,25 59:5 59:5,11 60:6,15 61:6 65:16,24 68:15 69:15 71:1 76:4 79:18 80:6,8 80:9 81:6 82:13 89:18 94:6 100:6 101:14 105:20 113:10 114:24 116:7,14 117:21 119:9,23 120:10 120:10,19 121:19 123:3 124:18 128:1,3 <b>paragraphs</b> 15:13 17:10 23:13 89:21 104:17 105:9 115:16 <b>parcel</b> 106:17 114:11 129:12 <b>parking</b> 114:20 <b>parol</b> 8:10 9:7 12:24 97:25 123:20 125:25 <b>parole</b> 123:16 <b>part</b> 8:5 11:19 16:7 53:4 55:16 62:11 68:21 98:16 98:16,18 104:4,13	110:9 113:7 114:2 115:3 116:11 132:8 <b>partially</b> 24:15 59:1 89:19 116:17 120:20 <b>particular</b> 7:4,24 117:12 127:3 <b>particularly</b> 82:4 86:18 97:2 123:17 <b>parties</b> 6:10,15 12:8 13:1 14:13 14:21 18:7 25:20 56:14,19,20 59:23 60:11 63:3 64:24 66:15 68:17,19,21 75:11 76:1 82:14 88:23 94:7,12,17 96:12,18 97:15 98:8 107:6 108:11 108:20 109:4 112:17 114:3,5,8 114:23 117:4 118:1,17 123:10 124:2,22,23 125:15 126:17 127:9,18,24 130:15,22 131:2 131:24 132:16,17 133:2,6 136:25 137:4 <b>parts</b> 65:12 <b>party</b> 7:7 30:10 34:10,11 57:4 60:9 68:24 83:17 96:13 98:9 109:6 109:8,11 111:4 115:25 116:2 124:4,4 125:6 126:14 127:4,20 <b>passed</b> 68:7,7 77:5,6 125:5
---	---	--	---

<p><b>patrons</b> 39:18</p> <p><b>pause</b> 11:24 20:18 44:18 79:13 87:14 88:6 94:21 118:11 119:12,18 120:12 121:15 122:11,20 123:24 124:11,20 125:16 126:5 131:19</p> <p><b>pay</b> 34:1,6,14 46:19,22 57:13 59:18 71:19 74:4 101:25 112:5 117:1,10 121:4</p> <p><b>paying</b> 46:23,25 63:11</p> <p><b>payment</b> 25:2 47:2,4,4 60:1 61:4 86:3 117:18 120:15,17 123:2 125:1 136:9</p> <p><b>payments</b> 95:19 118:23</p> <p><b>pecuniary</b> 57:4</p> <p><b>penalty</b> 89:3</p> <p><b>people</b> 14:4 96:25 102:5 109:14</p> <p><b>percent</b> 34:17,18 46:5 51:8,9,11 53:17,21,25 65:10 65:10 85:21 86:4 86:8 113:9</p> <p><b>perfectly</b> 108:18</p> <p><b>perform</b> 22:24 58:9 128:7</p> <p><b>performance</b> 11:18 12:8 13:2,6 13:16 68:19 92:9 93:20 94:6,10,18 123:9,23 124:2,4 124:5,6,8,13,23 125:14 126:2</p>	<p><b>performed</b> 92:9</p> <p><b>performing</b> 55:18</p> <p><b>period</b> 106:25 129:20 131:10</p> <p><b>permit</b> 103:22 124:1</p> <p><b>permits</b> 32:15,21 36:3,19 43:1 77:11,14 78:7 80:11,13 84:22 85:19 124:13 125:5 128:12,17</p> <p><b>permitted</b> 83:18 126:15</p> <p><b>permitting</b> 113:17</p> <p><b>person</b> 43:16 82:10 92:3 93:10 95:17 101:22,23 103:20 107:15</p> <p><b>perspective</b> 134:11</p> <p><b>pertains</b> 121:9 125:18</p> <p><b>petition</b> 134:9</p> <p><b>phone</b> 133:18</p> <p><b>photographs</b> 9:17 9:19 17:5,8,12</p> <p><b>pick</b> 72:7</p> <p><b>picture</b> 37:16,18</p> <p><b>pictures</b> 34:19,20 48:7,18 126:9</p> <p><b>pipe</b> 85:13</p> <p><b>place</b> 8:23 127:20 131:4 132:6</p> <p><b>plain</b> 123:15 124:14,24 133:5</p> <p><b>plainly</b> 126:17</p> <p><b>plains</b> 1:18</p> <p><b>plan</b> 36:11 37:23 42:18 55:17 80:16 81:13 83:24,24 105:7 106:7,21 107:9 113:8</p>	<p>114:11 128:22 129:16 130:10 132:1</p> <p><b>planning</b> 38:9</p> <p><b>plans</b> 36:9 37:10 37:21,23,24 38:5 38:11 80:15 81:11 81:15,21,22 106:6 106:19,23 107:13 115:12 128:21 129:14,18 130:8 132:14</p> <p><b>plaza</b> 5:19</p> <p><b>pleadings</b> 106:3</p> <p><b>please</b> 20:20,22 42:17 50:16</p> <p><b>plumbing</b> 22:25 23:22 60:19,22,23 60:24 66:4 115:18</p> <p><b>point</b> 7:11 9:2 58:11 70:2 74:14 75:7 78:19 79:24 80:2 81:19 82:1 83:3 90:13 91:10 93:10 94:15 95:1 95:1,2 98:7,12 99:1 101:15 109:8 109:21 110:4 111:20 121:23 135:2</p> <p><b>pointed</b> 31:6</p> <p><b>points</b> 119:4 133:10</p> <p><b>portfolio</b> 55:18</p> <p><b>portion</b> 9:4 12:2 48:12 55:12 58:21 95:22 98:23</p> <p><b>portions</b> 114:10</p> <p><b>position</b> 12:5 91:15,19 135:3</p> <p><b>possession</b> 5:3 53:17 57:3</p>	<p><b>possibility</b> 123:2</p> <p><b>possible</b> 36:16 80:19 106:11 129:3</p> <p><b>post</b> 15:23 75:12 125:1,3 134:9</p> <p><b>potential</b> 132:18</p> <p><b>potentially</b> 15:16 90:19</p> <p><b>power</b> 127:4</p> <p><b>practical</b> 69:4</p> <p><b>pre</b> 36:11 80:17 128:23</p> <p><b>preapproved</b> 106:8</p> <p><b>preclude</b> 121:2,3</p> <p><b>precluded</b> 96:11</p> <p><b>prefer</b> 48:4</p> <p><b>preference</b> 6:13</p> <p><b>preferred</b> 47:25</p> <p><b>prejudicial</b> 15:16</p> <p><b>premise</b> 56:16 121:25</p> <p><b>premised</b> 71:16</p> <p><b>premises</b> 67:11 92:5,10 113:4 114:9 128:5</p> <p><b>prepared</b> 19:25 54:10 57:17 72:13 91:20 119:7</p> <p><b>prepetition</b> 111:23</p> <p><b>present</b> 11:14 19:25 55:21 87:6 121:7</p> <p><b>presented</b> 15:10 93:4 100:10</p> <p><b>preserves</b> 75:13</p> <p><b>presumably</b> 7:5 8:3 10:10,11 113:4</p> <p><b>pretty</b> 109:20</p>
---	--	--	--



<p><b>preventing</b> 99:8  <b>previous</b> 68:15  <b>previously</b> 16:3  <b>principle</b> 126:22  <b>print</b> 30:25  <b>prior</b> 45:5,15 53:1              67:6 79:19 82:17              91:25 105:5              111:10 114:14  <b>probably</b> 35:11              38:24 40:12 41:1              65:15 67:16 75:14  <b>probative</b> 9:22  <b>problem</b> 67:20  <b>problematic</b> 7:24  <b>procedural</b> 8:12              10:7  <b>procedurally</b> 9:7              9:24 13:22  <b>procedures</b> 107:2              111:13 129:23  <b>proceed</b> 25:9 26:3              37:22 107:1,9              129:22 131:5,12              132:2,8  <b>proceeding</b> 46:22              49:16  <b>proceedings</b>              137:10 139:5  <b>process</b> 39:15  <b>produce</b> 10:19  <b>produced</b> 9:1 12:1              12:18 15:1,25              16:2,3 31:1  <b>product</b> 31:18  <b>program</b> 85:3  <b>progress</b> 55:8  <b>prohibit</b> 83:17              126:14  <b>prohibited</b> 83:12  <b>prohibits</b> 128:14  <b>project</b> 39:17,21              41:22,23,24 43:13</p>	<p>43:18,24 49:9          50:12,15,18,20,21          55:16 56:9 61:19          61:24 82:9,18          84:23 86:21          102:22 103:4          109:2  <b>projects</b> 42:22,22              58:9 61:20 80:8              115:17 118:25  <b>promises</b> 39:19  <b>prompted</b> 114:5  <b>pronounce</b> 76:25  <b>proof</b> 92:13              102:17  <b>proper</b> 55:22 57:9              58:2 74:11  <b>properly</b> 112:1,1  <b>property</b> 3:6,13              48:17,25 50:19              55:9,14 57:22              100:24 101:3              111:5 112:6 113:7              113:8 130:4  <b>proposal</b> 84:3              98:13 107:12,25              108:2,21 129:8              130:13,25 131:3,8              131:15 132:5,7,9              132:13  <b>propose</b> 105:15  <b>proposed</b> 39:13              103:23 111:11  <b>proposing</b> 101:2  <b>prosecuting</b> 85:2  <b>prospective</b>              132:21  <b>protocol</b> 36:13              80:18,25 84:2,9              104:16,18 106:9              106:14 108:14              115:14 128:24              129:6 131:13</p>	<p><b>protocols</b> 39:19              115:3  <b>prove</b> 92:21  <b>provide</b> 30:1              57:25 64:13 81:8              86:2 104:1,4              106:15,24 107:12              116:21 120:5              129:10,19 133:5              136:4  <b>provided</b> 8:4              10:16 24:12 32:25              34:15,17,22 41:9              68:12 107:2 122:3              129:23  <b>provides</b> 18:23,25              57:1 58:8 61:23              68:17 79:12 80:14              81:13 84:16 114:7              116:14 129:6  <b>providing</b> 136:2  <b>provision</b> 25:12              25:14 68:14,16              69:3,9 70:13,17              73:23,25 76:8,10              76:11,12 77:18              83:4,25 94:1              97:25 101:8 108:8              108:9,15 115:22              115:22 116:1,17              124:17  <b>provisions</b> 82:1              98:5,6 126:18  <b>pull</b> 36:3 77:11,13              80:11 84:22  <b>pulled</b> 32:15              36:19 50:24,24              103:9 104:6  <b>pulling</b> 51:17,18              78:7 80:13 104:5  <b>purchase</b> 56:18  <b>purpose</b> 83:13              90:5,11 126:13</p>	<p>127:5 134:21          135:10  <b>purposes</b> 75:21  <b>pursuant</b> 36:12              68:25 80:17 106:8              115:13 128:23  <b>pursue</b> 39:21  <b>put</b> 39:18 40:20              41:24 42:23 48:15              58:12 59:24 60:13              62:14 63:19 65:3              79:25 94:5 103:24              110:19  <b>putative</b> 101:9</p>
<b>q</b>			
<p><b>qualify</b> 13:3 93:21              94:8  <b>quantum</b> 75:11              102:19 120:16,18              121:2 122:22,24              134:4  <b>quarropas</b> 1:17  <b>quarter</b> 58:25  <b>question</b> 24:7              25:11 26:2 42:16              44:2 45:10,14              46:13 50:17 52:25              53:3,3 61:16              62:25 63:19 64:24              71:12 83:23 86:9              86:12 102:12,13              107:1,3 115:14              118:2 129:22,24              131:12  <b>question's</b> 16:18  <b>questioning</b> 50:13  <b>questions</b> 9:3              44:15 45:4 54:3              87:4 109:22  <b>quick</b> 7:6  <b>quickly</b> 7:1 12:12  <b>quit</b> 49:21</p>			

<b>quite</b> 58:4 98:4 107:11	98:17 99:13 104:9 107:23 108:5,7,23 121:21 134:12,14 134:17 135:18,23	118:22 122:14 130:2,12 139:4	<b>reimbursement</b> 16:14 87:25 112:6 133:10 138:8
<b>quote</b> 13:10 90:11 94:5		<b>record's</b> 77:13	
<b>quoted</b> 94:3 115:20 129:8 130:5	<b>reason</b> 29:16,19 41:25 57:14 71:1 79:20 108:16 114:15	<b>recover</b> 34:12 85:3	<b>reimbursements</b> 112:2
<b>r</b>	<b>reasonable</b> 59:12 60:11,12 63:3 107:16 116:22 127:8,11,15,21 130:23	<b>recross</b> 51:20,22	<b>rejected</b> 131:1
<b>r</b> 1:23 5:1 6:1 125:23 138:3 139:1		<b>redevelopment</b> 55:16 105:7	<b>rejecting</b> 132:11
<b>raise</b> 20:19	<b>reasonableness</b> 127:15	<b>redirect</b> 44:19 45:2 54:4	<b>rejection</b> 3:5,12 132:6,11 135:4
<b>raised</b> 11:18 13:17 69:12 112:8	<b>reasonably</b> 113:16 119:13	<b>refer</b> 21:2,5 66:2 66:23 133:12,16	<b>related</b> 22:25 23:21 38:4,7 80:7 130:4
<b>rdd</b> 1:4 2:1	<b>recall</b> 21:10	<b>reference</b> 30:24 94:5 127:11	<b>relates</b> 7:10 8:1 10:2 24:22 32:20 68:5 85:18
<b>reach</b> 39:18 50:7 55:9	<b>receipt</b> 106:22 129:17	<b>referenced</b> 15:11 15:12,21,21 115:19	<b>relating</b> 138:18
<b>reached</b> 87:20 137:4,4	<b>receive</b> 9:1 48:23	<b>referencing</b> 30:20	<b>relatively</b> 73:10 123:7 125:1
<b>reaching</b> 51:13	<b>received</b> 6:21 8:8 10:12 19:12,17,20 22:8,11 29:13 43:15 54:23 131:11	<b>referred</b> 93:10 105:15,21 128:25	<b>release</b> 119:22,24
<b>read</b> 10:20 42:16 42:16 43:5 44:5 58:11 69:2 82:12 83:16,20,20 90:8 98:7 100:10 126:14	<b>receiving</b> 50:14	<b>referring</b> 78:12 93:2	<b>released</b> 24:25 58:17 61:2,25 69:20 115:24 117:16 118:8,9 120:6 122:2
<b>reading</b> 73:19,20 130:7	<b>recital</b> 128:10	<b>refers</b> 112:12 132:12	<b>relevance</b> 117:12
<b>ready</b> 48:19 65:2 84:18	<b>recitals</b> 114:1	<b>reflect</b> 125:3	<b>relevant</b> 11:17 17:19 58:20 78:20 78:22 94:7 116:9
<b>real</b> 3:6,12 12:2,6 12:21 99:22 108:25 109:4,9 111:5 119:4 127:13 130:4 134:18	<b>recognized</b> 126:13	<b>refund</b> 71:21 121:17	<b>reliable</b> 7:9,14 10:13
<b>realistically</b> 108:7	<b>recognizes</b> 13:5	<b>regarding</b> 64:24 105:6 118:1 126:16	<b>reliance</b> 92:8
<b>really</b> 7:19,23 10:5 14:20 15:10 15:15 17:8,22 62:8 66:2 68:3 70:6 74:23 76:4 77:19 89:4 90:6	<b>recommend</b> 50:2	<b>regards</b> 49:14	<b>relied</b> 10:22
	<b>recommendation</b> 48:1	<b>regular</b> 45:18 92:1	<b>relocated</b> 48:12
	<b>reconfiguring</b> 114:19	<b>rehabilitation</b> 50:19 105:7 113:8	<b>reluctant</b> 133:22
	<b>record</b> 19:7 20:23 40:21 54:13 62:8 63:16 64:2 65:4 70:6 74:24 75:9 79:11 82:24 84:20 85:16 86:10	<b>rehired</b> 50:1	<b>rely</b> 9:4 15:18 70:13 74:23 93:17
		<b>reimburse</b> 113:3 117:10	<b>relying</b> 9:3 47:9 99:23
		<b>reimbursed</b> 46:10 67:9 92:6	<b>remain</b> 39:14 116:11
			<b>remainder</b> 24:24 61:1,25 66:16 91:21 117:15

[remainder - right]

Page 24

118:7 <b>remaining</b> 17:18 25:16 64:22 65:25 66:4 71:18 88:11 98:22 99:22 112:3 112:12,22,25 113:2 117:12,24 118:9 119:8,24 121:17 <b>remains</b> 100:12 <b>remarks</b> 32:3,5 <b>remediation</b> 36:11 80:16 81:13 106:7,16,21 107:8 128:22 129:11,16 130:10 132:1,22 133:1 <b>remember</b> 29:17 42:3 <b>removal</b> 106:16 129:11 <b>renew</b> 40:3 <b>renovation</b> 49:9 50:19 132:22 <b>renovations</b> 113:7 <b>repair</b> 24:16 59:2 59:19 60:2 89:19 116:17 117:1 <b>repairs</b> 35:24 80:10 128:4,8,11 128:18 <b>repeat</b> 38:6 47:22 50:16 <b>repeated</b> 78:9 85:24 124:3 <b>repeatedly</b> 50:8 51:14 <b>rephrase</b> 45:10,13 46:14 47:13 <b>replacements</b> 128:18 <b>reply</b> 3:15,20,20 4:2,2 12:25 13:5	49:22 65:22 93:25 106:25 108:7 129:20 131:10 <b>reported</b> 83:15 <b>reporter</b> 42:8 <b>represent</b> 29:14 31:3 <b>representation</b> 29:16,19 31:4 <b>representations</b> 47:9 92:8 <b>representative</b> 26:10 49:14 95:18 <b>representatives</b> 12:13 45:7,17,23 <b>request</b> 10:17,18 10:21 11:10,21 47:24 59:13 60:12 68:4 92:4 95:20 116:24 125:9 <b>requested</b> 117:8 <b>requests</b> 11:9,12 47:21 92:8 <b>required</b> 59:19 117:2 118:3,25 119:9,16 120:2,10 120:14,20 121:19 128:19 130:10 133:4 <b>requirement</b> 105:17 127:15 135:11 <b>requirements</b> 109:7 <b>requires</b> 120:25 136:1 <b>reservation</b> 2:12 2:18 <b>reserved</b> 86:23 <b>residual</b> 122:7 <b>resolution</b> 55:9 126:1	<b>resolve</b> 55:6 87:16 123:21 <b>respect</b> 11:4 15:9 15:19 17:17 45:16 46:17 47:23 49:9 50:12 60:8 87:21 95:8,9 111:21 112:5,19 113:11 114:4 115:17 124:3 130:4 131:7 134:24 <b>respects</b> 11:7 133:11 <b>respond</b> 40:8 81:14 82:23 113:17 130:18 <b>responded</b> 82:11 107:24 131:17 <b>responding</b> 107:25 109:8,11 <b>response</b> 39:8,10 39:22 40:1,10,12 40:13,15,16,22 48:24 50:9 75:5 82:14,18,19,24 84:6,8 105:18 107:21,22 108:3 109:1,1 131:4,15 131:21 <b>responsibilities</b> 56:21 <b>responsible</b> 35:13 35:15,24 80:7,10 110:5,13 111:20 112:5 128:3 132:21 <b>responsive</b> 9:20 <b>rest</b> 15:2 72:23 73:5 <b>restated</b> 111:4 112:15 113:25 119:2,17 127:23 130:24	<b>restatement</b> 114:6 114:21 <b>resubmit</b> 57:18 <b>result</b> 135:3,4 <b>resulting</b> 57:5 <b>retrofit</b> 35:10 36:20 48:1 51:5 79:16 85:18 <b>return</b> 55:25 67:24 70:25 71:18 72:23 73:4 85:10 85:14 99:21 100:11 110:17 <b>returned</b> 91:21 <b>review</b> 25:18 29:17 64:23 118:1 <b>reviewed</b> 16:5 28:25 92:24 115:12 <b>riddled</b> 39:17 <b>right</b> 6:2 10:15 13:8,13 14:4,6,15 14:22 15:14,23 16:7 17:8,19 18:3 18:5,11,18 19:4 20:17,19 22:6 31:9 32:22 38:17 54:18 59:22 60:5 60:7,21 62:2,6,10 63:25 64:6 65:9,9 65:19,21 66:8,10 66:15,17 67:3,11 67:18,23 68:1,24 69:1,24 70:15 72:18 73:3,15 74:7,12,16 75:10 75:13,19 76:13,14 76:23 77:20 81:4 81:7 87:23 88:14 88:22 89:7 90:2 91:18,23 94:23,24 94:25 95:14 96:4 96:23 97:10 98:1
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[right - see]

Page 25

98:24 99:4,14,16 99:21 100:4,9,12 100:21,24 101:20 101:24 102:16 103:4,6,13 104:2 105:8,11 110:7,25 111:3 119:24 120:15,17,17 126:18 127:1 134:5 135:5 136:9 137:6 <b>rights</b> 2:13,18 13:17 68:21 77:17 86:23 98:9 114:12 116:2 123:13 127:5 131:7 <b>ripe</b> 62:12 <b>risk</b> 39:18 56:10 109:9 <b>risks</b> 82:9 <b>river</b> 2:9,15,21 3:4,11 11:2 21:5 <b>road</b> 139:21 <b>robert</b> 1:24 <b>roebuck</b> 111:3 <b>roof</b> 98:19 <b>rooftop</b> 98:19 <b>room</b> 1:17 48:10 48:13 84:13 <b>route</b> 71:1 <b>rule</b> 7:5 12:24 17:1 86:1 123:16 123:20 126:16,22 <b>rules</b> 10:14 108:18 <b>ruling</b> 86:2 110:3 110:16 111:21 131:15 133:17 134:20 135:22 <b>rulings</b> 54:20 <b>run</b> 103:15	<b>s</b> <b>s</b> 5:1,15 6:1 20:25 25:2,17 138:3,11 <b>sachs</b> 127:21 <b>sale</b> 55:13 128:15 <b>salvage</b> 43:2 <b>sand</b> 79:25 <b>satisfied</b> 100:8 <b>satisfy</b> 86:16 <b>satisfying</b> 104:23 <b>saturday</b> 53:25 <b>saw</b> 13:25 40:7 86:6 <b>saying</b> 52:18,25 66:23 67:8 70:8 88:14 89:9 90:25 92:11,14 96:18 99:2 100:10,11,12 100:15 <b>says</b> 16:20 31:25 33:12 34:13 37:4 39:10 49:24 50:2 53:4 59:11 60:10 60:15 61:6 64:19 65:1,4,5,6,7,10,13 66:3,20 70:10,17 77:6 79:18 81:8 83:11 84:1,25 88:5,10,11 89:17 90:7,10 96:6,22 99:23 101:5 106:5 108:4 128:3 <b>schedule</b> 3:13 80:15 81:12 106:6 106:20 107:7 128:21 129:15 131:25 <b>scheduled</b> 130:9 <b>schedules</b> 36:10 <b>scope</b> 37:9,11 81:10 83:11 106:18 107:6 129:13 131:24	<b>se</b> 120:24 <b>seal</b> 39:4 <b>sear's</b> 84:7 <b>sears</b> 1:10 2:1 6:2 11:19,19 12:5 24:5 28:19,19 30:5,7,12,15,15 30:21 31:19 33:12 34:1,4,6,10,14 35:3 36:23 37:4 37:22 38:18 45:6 45:7,16,18,23 46:6,9 47:9,20,24 48:9,12,16,17,21 48:21,22,24 49:4 49:5,10,13,13,14 49:16,18,23 50:7 50:9,10 51:4,5,7,8 51:11,14 52:13,16 52:23 53:1,6,8 55:18,21 62:13,24 63:6,11,16,24 64:3,14 65:3 67:6 67:12 79:5,25 81:25 82:3 84:4,7 84:12,24 85:3 86:7 87:18,24 88:9,18,18 92:1 93:5,10,19 95:18 95:23 98:25 99:7 102:10 103:10,24 104:3,5 105:5,6 105:14,19,22 108:1,5 109:11 111:3,11,19 112:5 113:9 119:3,7,14 119:15 130:3,16 131:17,22 132:6 132:25 133:4,20 134:6,9 135:18,19 <b>sears's</b> 119:10 <b>season</b> 128:15	<b>second</b> 7:10 8:2 21:10 23:2 37:20 56:6 57:21 59:10 66:17,18 70:10 88:10 120:2 121:19 125:17 <b>secondly</b> 112:24 113:5 119:3 122:25 <b>section</b> 24:20 73:23 79:24 80:14 84:2 88:7 104:16 106:4,14 107:24 111:18 112:14 113:11 114:7,23 115:6,20,22,23 117:11,13 118:16 118:19 119:1,9,17 120:3,4,11,25 121:9,20 122:1 123:4,5 125:5 128:13,14,16 129:1,2,7,8,9 130:5,10 131:9,16 131:22 <b>sections</b> 24:22 60:17 61:9,18 64:20 66:19 115:5 117:14,22 118:4 <b>secure</b> 24:15 59:1 89:19 90:5 116:17 120:20 134:22,23 <b>secured</b> 90:22 <b>securing</b> 89:24 <b>security</b> 78:7 <b>see</b> 11:21 23:5,5 23:10,11,15 27:13 30:25 33:4 51:3 53:12 86:15 94:14 94:15 103:17 104:4,22 108:19 127:12,21 136:4
--	--	--	--

[seeing - sort]

Page 26

<b>seeing</b> 104:8	<b>serious</b> 10:6	28:3,8,13,21,23	<b>signed</b> 26:9,12
<b>seek</b> 58:18	126:11	29:3,8,14,21 30:4	84:19 115:25
<b>seeking</b> 34:12	<b>serve</b> 16:7	30:13,19 31:1,3	119:16
<b>seeks</b> 16:14 55:24	<b>served</b> 8:6	31:25 32:25 33:1	<b>significant</b> 9:4
<b>seen</b> 37:3 109:18	<b>service</b> 60:19	34:9,12,15,22	132:13
<b>segregate</b> 101:5	115:18	35:2,7,10,12	<b>silence</b> 108:1
<b>seismic</b> 23:22	<b>services</b> 22:25	36:19 37:2,16,21	<b>simply</b> 71:18
31:17 32:12,15,20	79:8 136:2,4	38:1,5,8,13,17	79:25 81:16
35:10,23,24 36:11	<b>set</b> 12:25 13:25	39:3,5,25 40:4,11	<b>single</b> 30:6 43:23
36:19 47:25 48:4	18:24 28:14 37:9	40:14,19,24 41:9	<b>sir</b> 54:6
51:5 59:7 68:9	72:16,17 81:10	41:16,20,20 42:2	<b>site</b> 114:11
75:22 77:8,10,21	89:13 105:9 106:7	42:4,12,15,18	<b>sitting</b> 21:13 34:4
77:24 78:21 79:16	106:19 107:13	43:5,8,20,25 44:2	37:24
80:9,10,16 85:18	111:13 113:24	44:9 45:4 51:24	<b>situation</b> 96:14
89:22,25 95:10	114:12 115:8,9	52:7,9 53:3,14,16	98:9
98:14 99:4,9,24	116:16 117:6,7	53:21,24 54:1	<b>situations</b> 127:3
100:2 106:4,7	118:18 122:16	87:8,11 91:25	<b>six</b> 38:19 41:18
113:11 115:18	128:1 129:13	103:8 105:21	81:25 82:5 84:5
119:8 125:11,13	130:8 131:17	138:21,24	84:25 105:16
128:2,4,7,11,17	132:14,15,18	<b>shomof's</b> 11:13	<b>size</b> 37:23,24
128:18,23 133:1	<b>sets</b> 58:25 111:24	22:7 65:21 105:10	<b>skaw</b> 4:25 139:3
<b>sellers</b> 3:2,9	114:22 119:10	<b>shot</b> 109:7	139:14
<b>send</b> 51:17	123:23	<b>show</b> 11:17 44:13	<b>small</b> 30:25 31:10
<b>sent</b> 8:24 26:17	<b>setting</b> 3:13 37:15	48:18 75:15 94:9	73:10 123:7 125:1
28:19 30:7 36:22	<b>settle</b> 136:12	102:4 125:14	<b>sole</b> 79:20 114:15
39:6 52:21 53:6,8	<b>share</b> 48:8	<b>showed</b> 34:19	114:25
111:11	<b>sharefile</b> 12:17	93:18	<b>solutions</b> 139:20
<b>sentence</b> 64:19	<b>shaw</b> 49:13,14,20	<b>showing</b> 52:4	<b>son</b> 36:22 40:6
66:17,18 69:19	49:20,22	118:23	<b>soon</b> 136:16
70:10 88:11	<b>sheet</b> 42:21	<b>shown</b> 114:11	<b>sorry</b> 9:17 19:16
118:18 119:22	<b>shocking</b> 49:4	124:15,16	20:11 23:3 26:21
120:3,4 121:19	<b>shomof</b> 2:8,8,13	<b>shows</b> 16:12,13	31:1 32:4 33:13
122:1,4 123:4	2:13,17,19,19 3:2	17:10 88:2 92:7	33:14 37:16 41:2
<b>separate</b> 90:13	3:2,9,9 4:1 11:2	93:20	45:13,13 66:2
91:10 108:11	11:14 12:15 15:11	<b>shut</b> 38:19 81:25	67:2 72:3,5 74:20
115:25	15:22 19:25 20:15	82:4 84:4	74:25 78:11,12,16
<b>separately</b> 77:24	20:21,25,25 21:1	<b>shutting</b> 84:25	110:1 111:6 113:1
<b>september</b> 32:21	21:3,3 22:8,10,19	<b>sic</b> 27:5 61:1,25	114:3 117:6 118:8
36:23 41:8,11,14	22:24 23:3,20	<b>side</b> 13:16 82:15	127:12 133:14,19
81:20 84:4 104:23	24:7,10,20 25:5,8	137:2	136:3
107:14 130:2,15	25:11,20 26:1,6	<b>signage</b> 23:1,22	<b>sort</b> 45:6 91:4
131:15	26:14,15,21,22,24	24:23 48:14 60:20	133:6
	27:3,12,16,18,22	60:25 115:18	



[sorted - support]

Page 27

<p><b>sorted</b> 134:25</p> <p><b>sought</b> 57:11 130:19</p> <p><b>soul</b> 42:23</p> <p><b>sounds</b> 32:2 97:17 109:18</p> <p><b>source</b> 18:6 123:2 125:24 136:9</p> <p><b>sourced</b> 10:5</p> <p><b>sourcing</b> 10:13</p> <p><b>south</b> 5:11 57:22</p> <p><b>southern</b> 1:3</p> <p><b>space</b> 48:9,12,16 51:13 83:22</p> <p><b>spaces</b> 114:20</p> <p><b>speak</b> 31:23 45:12 87:10 110:21</p> <p><b>speaking</b> 17:11</p> <p><b>speaks</b> 83:1 84:8</p> <p><b>specific</b> 18:10 106:4 115:17 116:6</p> <p><b>specifically</b> 68:12 88:23 125:5 128:15</p> <p><b>specification</b> 128:21</p> <p><b>specifications</b> 36:9 80:15 81:11 81:22 106:6,19,24 107:13 115:12 129:14,19 130:8 132:14</p> <p><b>specifics</b> 38:8</p> <p><b>specified</b> 87:25 89:16 102:6 132:18</p> <p><b>specify</b> 108:20</p> <p><b>specifying</b> 48:3</p> <p><b>speculative</b> 56:8 85:6,7</p> <p><b>spell</b> 20:22</p>	<p><b>spelled</b> 94:13 109:5 131:6</p> <p><b>spend</b> 62:24 88:18</p> <p><b>spent</b> 70:7 133:23</p> <p><b>spirit</b> 39:11</p> <p><b>spoke</b> 48:3</p> <p><b>spoken</b> 32:1,5</p> <p><b>stamp</b> 27:9,15</p> <p><b>stand</b> 20:17 37:24 72:1,4 82:20 86:12 87:8</p> <p><b>standpoint</b> 10:7</p> <p><b>start</b> 9:9 22:21 37:15 38:3,9 40:2 50:25 51:7,10 53:22 54:21 58:6 77:12 80:2 86:8 107:14 125:13 130:16,18</p> <p><b>started</b> 44:13 68:10 77:10</p> <p><b>starting</b> 42:15 80:1</p> <p><b>state</b> 85:9 117:21 119:7 131:21 135:9</p> <p><b>stated</b> 82:16 91:25 92:20 94:12 113:5 113:20 114:1 122:19</p> <p><b>statement</b> 2:4 120:19</p> <p><b>states</b> 1:2,16 40:1 81:9 92:7 94:23 95:2 106:14 115:23 117:13 119:4 129:9 131:23</p> <p><b>stating</b> 114:25</p> <p><b>status</b> 48:5 50:12 50:14,18,23</p> <p><b>steadfast</b> 125:23</p>	<p><b>steen</b> 5:17</p> <p><b>step</b> 54:6,7 102:25 106:10</p> <p><b>steve</b> 40:18 49:12 49:13,19,23,24 50:1,2,10</p> <p><b>stipulation</b> 3:1,8</p> <p><b>stop</b> 25:7 47:12 86:3</p> <p><b>store</b> 2:7,13,18 3:16,22 4:3 21:8 31:19 55:11,16 82:3 96:1 98:18 98:20,21 105:16</p> <p><b>storek</b> 83:10,10 83:10 127:12,12</p> <p><b>stores</b> 55:18</p> <p><b>strategy</b> 38:3,4,7</p> <p><b>street</b> 1:17</p> <p><b>stretch</b> 58:4 99:22</p> <p><b>strictly</b> 87:25 89:15</p> <p><b>strong</b> 86:17</p> <p><b>stuck</b> 109:12,13</p> <p><b>subcontract</b> 63:16</p> <p><b>subcontractors</b> 70:4 112:20 123:9</p> <p><b>subject</b> 25:18 55:13,14 64:17,23 115:6 118:1 126:17 128:12</p> <p><b>submit</b> 78:25</p> <p><b>submitted</b> 7:5,8 21:1,6 27:20 30:9 30:15 37:23 51:24 52:2,3,4 53:4 71:5 73:13,14</p> <p><b>subparagraph</b> 24:19</p> <p><b>subsection</b> 66:7</p> <p><b>subsequent</b> 12:15</p> <p><b>subsequently</b> 26:17</p>	<p><b>substance</b> 12:21 45:20</p> <p><b>substantial</b> 112:17,18 117:9 126:4 127:25</p> <p><b>substantive</b> 14:21 48:23 50:9 87:19 105:18</p> <p><b>successful</b> 56:15 114:9</p> <p><b>sufficient</b> 122:17 124:23 125:14</p> <p><b>suggest</b> 130:12</p> <p><b>suite</b> 5:12 139:22</p> <p><b>sulmeyer</b> 5:9</p> <p><b>sulmeyerakupetz</b> 11:1</p> <p><b>sum</b> 112:18,21</p> <p><b>summarize</b> 7:1 19:8 104:21</p> <p><b>summary</b> 7:4 10:2 10:8 15:10 19:6 122:12 125:24 138:18</p> <p><b>supplement</b> 13:2 13:7,10,11 86:24 93:21 94:8</p> <p><b>supplemental</b> 2:12,18 10:9 13:24 18:22,24 22:10 112:11 113:12,12 138:23</p> <p><b>supplemented</b> 87:1</p> <p><b>supplements</b> 124:10</p> <p><b>support</b> 2:17 3:15 3:21 4:1,2 10:22 21:2,6 33:3 51:25 65:22 70:6 73:9 93:6 118:21 122:17 134:19</p>
---	---	---	---

[supported - thinks]

Page 28

<p><b>supported</b> 85:17 127:7 <b>supposed</b> 131:2 <b>supreme</b> 83:11 <b>sure</b> 10:12 11:23 19:4 29:10,11 35:5 41:17 44:23 53:12 54:12 58:23 69:17 134:7 <b>surreply</b> 8:5 <b>sustained</b> 75:9,15 <b>swore</b> 29:5 42:10 <b>sworn</b> 20:21</p>	<p><b>tandem</b> 119:8 <b>tax</b> 55:15 56:10 112:2,6 133:10 138:8 <b>taxes</b> 57:22 <b>technical</b> 73:19 <b>technically</b> 60:22 60:24 <b>telephone</b> 92:3 <b>telephonically</b> 5:7 <b>television</b> 126:9 <b>tell</b> 15:16 42:10 49:17 100:3 <b>ten</b> 106:22 107:14 108:3 129:17 131:9 <b>tenable</b> 132:23 <b>tenant</b> 16:19 18:16 24:12,25 25:1,2,6,6,9,16,21 25:25 26:10,17,17 36:12,17,23 39:6 39:8 56:16 57:13 58:17,18 59:11,16 59:20 61:2,3,4,25 62:1,4 63:1,4,5 64:22 66:16,23 67:2 68:8,10 69:5 69:6,20,21,24 71:2 73:21 74:1 78:4,24,25 80:17 80:20 81:14 82:8 82:16 83:5,22 84:12,16 88:1 97:3 99:18 100:17 100:21 106:8,12 106:22,25 107:3,4 107:5,10 111:18 112:21 113:1,14 113:16 114:10 115:13 117:6,7,16 117:17,18,24 118:8,9,10,13,14</p>	<p>120:6 121:11,25 122:2,5,6 123:12 125:4,6,18 128:23 129:4,17,20,24,25 131:4,9,10,11,23 132:3,20 135:20 136:2 <b>tenant's</b> 24:25 58:17 61:3 62:1 63:1,4 69:20 76:14 79:19,21,22 92:8 100:22 114:9 117:17 120:6 131:7 132:8 <b>tenants</b> 114:11,14 114:17,18 116:22 <b>term</b> 94:9 124:17 124:17 <b>terminate</b> 108:16 <b>termination</b> 132:21 <b>terms</b> 13:3,22 49:17 59:20 69:14 83:8,13,19,21,21 87:18 89:8 93:22 94:8 97:14 98:3 99:19 102:22 103:21,22 104:5,6 104:12,12 114:4 115:6 116:13 120:21 124:9,14 124:24 126:23,23 128:13 132:22 133:5 <b>testified</b> 30:13 41:8,10,21 43:8 52:9,12 53:16 92:22 103:8 <b>testify</b> 62:23 <b>testifying</b> 47:10 <b>testimony</b> 17:9 20:2 21:14,15,19 22:4,7 54:14</p>	<p>63:10 64:25 65:5 84:19 85:20,22 86:13 89:13 91:24 92:7 93:9 132:24 <b>testimony's</b> 81:22 <b>thank</b> 15:4 17:3 19:21,23 22:15 26:14 30:17 44:20 44:24 45:1 51:19 75:6 109:24 135:14,21 136:11 137:7,8,9 <b>thereof</b> 79:23 114:18 <b>thing</b> 50:2 71:3 81:19 89:22 100:19 <b>things</b> 63:8 67:7 69:5 71:2 95:23 99:14 107:17 108:13 <b>think</b> 7:8 8:11 9:6 9:22 10:3,6 12:10 13:23 15:23 16:1 16:17 17:4,13,13 17:17,21,24 18:1 18:7,9,12,13 19:4 26:5 31:22 41:14 41:17 45:14 61:11 62:7,11 65:20 67:14 68:2,5,13 68:20 69:9 73:20 75:3,4 76:3,5 81:2 82:25 83:9 84:7 85:5,9 86:16,17 87:13 90:6,15 97:22,23 98:3,10 99:17 100:24 102:18 103:20 107:20 109:14,23 110:15 <b>thinks</b> 82:22</p>
<p><b>t</b></p>			
<p><b>t</b> 68:25 138:11 139:1,1 <b>tab</b> 22:22 23:3 24:11 26:21,21,22 26:22 27:3,13,22 27:22 28:3,8 30:19 32:25 33:14 35:11,20 36:25 37:8 39:5 42:2 <b>table</b> 34:4 <b>tabs</b> 20:7 <b>take</b> 20:17 36:2 64:14 69:8 100:6 100:21,25 101:5 110:19 <b>taken</b> 9:19 17:12 110:18 <b>takes</b> 69:9 <b>talk</b> 13:9 40:19 58:5 68:2,4 71:5 78:6 93:13 <b>talked</b> 78:6 85:7 <b>talking</b> 30:7,18 43:24 49:15 52:1 52:6 82:15 91:2,2 91:12 99:13,14 103:1,14 134:22 <b>talks</b> 69:19 93:9 94:1,3 105:22</p>			

[third - use]

Page 29

<b>third</b> 30:10 34:10 34:11 60:9 <b>thirty</b> 59:13 <b>thorough</b> 7:20 <b>thousand</b> 63:13 <b>three</b> 16:6 30:4 52:1 58:25 111:24 <b>ticking</b> 107:15 <b>tie</b> 98:13 <b>tied</b> 7:23 55:15 <b>ties</b> 10:11,11 <b>time</b> 3:4,11 8:5 11:16 12:2,3 13:17 31:17 42:10 43:8 44:15 48:20 50:1 54:11 59:12 60:11,12 66:5,7 68:16,18 95:20 100:22 101:16 116:22 118:12 120:14,25 128:19 133:23 <b>timed</b> 77:24 <b>timeframes</b> 100:5 <b>timeline</b> 37:19,20 38:17,18,21 39:14 81:24 <b>timely</b> 25:15 58:14 64:21 66:17 66:20,23 67:9 70:11 76:17 77:14 90:17 98:3 107:5 112:11 113:12 117:23 120:2 131:23 <b>times</b> 49:15 <b>timing</b> 8:22 12:10 14:18 39:20 47:21 132:14 <b>title</b> 59:15,15 <b>today</b> 21:13 42:19 55:10 58:4 73:16 78:23 79:4 82:21	85:20,22,24 86:1 93:8 101:11 102:18 110:9 111:21 118:6 121:18 134:7 136:19 <b>told</b> 40:3 51:8 92:12 <b>tomorrow</b> 53:20 53:22,24 100:21 101:16 118:15 <b>top</b> 23:5,8,10,11 32:20 39:7 81:2 <b>touch</b> 78:3 <b>track</b> 119:8 <b>transaction</b> 124:3 <b>transcribed</b> 4:25 <b>transcript</b> 42:3 139:4 <b>transfers</b> 10:3,3 134:8 138:19 <b>transform</b> 3:15,20 4:2 5:18 6:5 12:5 12:19 49:7 54:15 55:3,6,6 57:3,17 57:25 71:13 86:2 87:18,22 110:5,18 111:1,12,19,25 112:4 134:12 135:20 137:4 <b>transform's</b> 11:10 11:12 55:17 110:22 <b>treated</b> 131:1 <b>tried</b> 40:20 49:19 87:16 104:19 <b>trigger</b> 131:21 132:8 <b>trouble</b> 75:3 <b>true</b> 68:3 84:6 86:14 106:3 139:4 <b>trust</b> 2:8,14,20 3:3 3:10 11:2 21:4	<b>trustee</b> 57:2 <b>truth</b> 42:10 <b>try</b> 50:7 51:14 55:1 56:7 84:15 85:3 98:8 107:17 136:25 <b>trying</b> 34:4 42:21 62:17 87:5 93:16 <b>turn</b> 24:10,19 26:21 27:3,12,22 28:3 32:24 35:10 39:25 42:2,12 59:11 65:14 116:22 <b>turning</b> 79:15 129:5 <b>twice</b> 27:17 31:19 99:4 <b>two</b> 6:14 17:7 20:5 21:2,6 39:20 55:19 57:8 71:22 73:11 81:9 82:1 82:17 87:1 95:22 99:13 106:15 111:25 112:9 118:21 119:10 129:10 133:10 <b>type</b> 48:24 107:12 107:25 108:2 110:10 <b>typical</b> 57:23	<b>unambiguous</b> 56:2 <b>underlying</b> 15:17 15:20 16:9,11,12 92:25 <b>understand</b> 14:3 47:3 61:21 62:21 62:24 69:18 74:14 88:25 91:8,16 103:20 104:11 135:8 <b>understanding</b> 47:20 87:24 89:14 93:14 96:10 137:3 <b>understood</b> 13:19 13:21 15:7 30:6 41:20 43:17 44:6 61:19 62:18 67:10 97:7,11 99:11 110:20,21 130:15 <b>undisputed</b> 61:8 116:6 118:3 <b>unenforceable</b> 89:3,4 <b>unexpired</b> 57:2 <b>unfair</b> 90:15 <b>unfettered</b> 127:6 <b>unfortunately</b> 55:8 <b>unique</b> 57:17 <b>united</b> 1:2,16 <b>units</b> 48:7 <b>unlettered</b> 114:24 <b>unnecessary</b> 131:14 <b>unreasonably</b> 102:7 107:10 132:3,9 <b>unsecured</b> 134:8 <b>uploaded</b> 12:16 <b>urge</b> 136:25 <b>use</b> 14:13 15:1 23:4 56:16 70:23
		<b>u</b>	
		<b>u</b> 138:3 <b>u.s.</b> 1:25 <b>u.s.a.</b> 127:21 <b>u.s.c.</b> 3:5 56:25 <b>uh</b> 22:16 106:1 <b>ultimate</b> 79:5 95:22 <b>ultimately</b> 103:19 103:22 <b>unacceptable</b> 107:18 132:7	



[use - work]

Page 30

73:21 79:22 85:2 97:24 112:25 113:2 114:10,18 125:6,25 128:6 <b>uses</b> 110:19 <b>usually</b> 82:23	97:1 109:16 115:23 123:12 <b>waiver</b> 68:16,23 68:24,25 76:11,12 93:15 94:9,13 99:3 100:7,8 109:17 115:22 116:2 119:16 124:15,16,17,18 <b>waiving</b> 115:25 <b>walk</b> 58:22 103:21 105:1 <b>walking</b> 62:15 <b>walt</b> 126:8 <b>want</b> 9:4 16:20 20:14 21:15 22:21 31:20 32:11,24 37:22 40:7,8 41:24 42:23 51:3 61:8 62:23 68:4 69:6 73:23 74:19 74:22 75:2,7,20 76:20 77:7 78:25 83:2,3,5 87:13 90:18 96:15 102:21,23 109:19 134:6 <b>wanted</b> 48:1 64:15 67:17 108:1 110:22 133:24 <b>wants</b> 96:13 104:20 <b>water</b> 44:22 <b>waved</b> 98:9 <b>way</b> 9:23 11:9 43:2 45:21 52:5 57:16 85:3 89:8 96:18,24 <b>we've</b> 10:12 29:13 42:19 52:1 59:3 76:13 78:5 79:10 85:7 98:2 102:25	<b>weaver</b> 5:22 6:4,5 6:7,16,19,22,25 7:3,12,15,18 8:1 8:17 9:13,15 10:1 10:18 14:11,20,23 16:17,24 17:3,24 18:4,6,12,15 19:23 20:16 22:12 22:15,18 23:12,14 23:17,19 33:14,17 33:20,22 41:7 44:6,8,15 46:12 47:10 51:21,23 54:3,10,15 55:1,2 57:21 58:2,23 59:6,8,23 60:4,20 60:22,24 61:11,14 61:17 62:3,7,11 62:16,18,20,22 63:7,14,18 64:7 64:10,16 65:7,16 65:18,20,23 66:6 66:9,13,21,25 67:13,18,20,23 68:1 69:17,22 70:2,13,16,19,22 71:9 72:25 73:2,4 73:7,11,16 74:5,8 74:11,13,15,17 75:1,6,17,20,25 76:3,12,18,20,24 77:4,21,25 78:15 78:18 79:9,15 81:1,5,8 86:10,15 86:25 87:3 110:1 110:13,20 111:1,8 136:15,18,22 137:3,7 <b>week</b> 7:19 8:8 10:20 39:12 136:19 <b>weeks</b> 81:9 106:15 129:10	<b>weil</b> 5:2 <b>went</b> 14:4 28:18 49:4 84:12 85:4 93:11 116:21 <b>whatsoever</b> 49:5 49:22 79:23 114:19 <b>whisper</b> 87:12 <b>white</b> 1:18 <b>willing</b> 84:18 <b>win</b> 101:10 <b>windfall</b> 88:20 101:8 102:15 <b>wire</b> 10:2,3 138:18 <b>wished</b> 131:5 <b>withheld</b> 79:19 102:7 107:10 114:15 132:4,10 <b>witness</b> 6:13 9:21 20:21,24 21:12,16 21:20,22,24 22:1 22:3,5,13 23:15 33:16 41:5 44:21 44:24 45:1 46:21 54:7,9 64:25 78:13 86:13 89:13 <b>wolf</b> 126:8,12 <b>wondering</b> 52:8 <b>word</b> 43:13,23 66:17 76:16 98:3 <b>words</b> 31:25 96:16 117:5,7 <b>work</b> 16:13,16,18 22:25 23:21,22 24:1,3,8,21 25:1,4 25:7,7,9,15 26:3 30:8,10,11,11 31:17 32:15,16 34:19 35:23 36:6 36:11,15 37:9,11 40:2 45:21,24 46:7,11,16 47:6,8
<b>v</b>			
<b>v</b> 125:23 126:8 127:12,21 <b>valid</b> 44:9 85:19 86:5 102:4,5 <b>various</b> 19:1 138:16,20 <b>vary</b> 59:25 83:20 104:12 126:23 <b>vast</b> 55:5 <b>vegas</b> 2:9,14,20 3:3,10 11:2 21:4 <b>velkei</b> 49:8,11,12 49:13,17 105:13 105:21,22 108:25 <b>velkei's</b> 131:18 <b>venture</b> 133:22 <b>verbal</b> 82:21 <b>veritext</b> 139:20 <b>vicinity</b> 128:5 <b>view</b> 50:14 72:16 85:9 93:13 94:17 101:21,21 135:2 <b>violate</b> 127:9 <b>visual</b> 36:16 80:20 106:11 129:3 <b>voltage</b> 22:25 23:21 24:23 60:19 115:17 <b>volumes</b> 83:1 84:8 <b>voluntarily</b> 97:15			
<b>w</b>			
<b>wait</b> 15:2 52:15 <b>waive</b> 68:18 77:17 94:14 125:15 <b>waived</b> 69:1 76:14 91:5,17 93:13			

[work - zero]

Page 31

47:15,21,23 48:5 48:15 51:25 52:25 56:3,5 58:14,18 59:7,19 60:3,16 61:3,6,9,10,11,24 62:5 63:1,6,16 64:15,20 65:1,4,8 65:13,24 66:3,4 66:11,12,19 67:7 67:8,11 68:9 69:5 69:6,11,25 70:23 71:16,20 72:9,12 72:22 73:4,22,24 74:2 75:12 77:8 77:16,22,23,24 78:21 80:1,9,12 80:17,21 81:10 85:13,15,15 88:8 88:19 89:12,16,25 89:25,25 90:16,21 90:23 91:20 92:4 92:10 93:18,20,20 95:10,10,15,20,22 96:1,24 97:4,12 98:8,13,14,17,18 98:22 99:4,8,9,11 99:12,15,18,20,22 99:24,25,25 100:2 100:16,18,24 101:10,23,24,25 102:5,19 103:3 104:15 106:5,8,16 106:18 107:1,3,7 107:17 112:19 113:10,11,12,18 113:21,23 114:2 114:22,23 115:1,4 115:14,16,18,19 116:6,20 117:2,11 117:14,17,20,22 118:3,10,16,23 119:6,8,9,15 120:1,7,9,13,21	120:24 121:12,18 122:5,6,16,18,19 123:8 124:25 125:2,2,4,6,10,11 125:13 127:25 128:2,14,23 129:11,13,22,24 131:12,25 132:9 133:1 134:3 135:17 136:19,25 <b>work's</b> 77:10 85:11 <b>worked</b> 13:22 30:12 55:6 61:20 <b>working</b> 11:19 130:3 <b>works</b> 95:16 <b>world</b> 86:18 108:25 109:4 <b>worse</b> 135:2 <b>write</b> 109:4 <b>writes</b> 32:19 <b>writing</b> 60:6 68:18 82:22,23 115:10,25 <b>written</b> 25:21,24 40:10,12,13,15,16 40:22 59:13,21 68:24 82:24 89:8 116:24 119:16 123:18 124:10 130:2 <b>wrote</b> 30:14 32:6	<b>year</b> 32:16,21 36:20 46:24 49:3 51:12 77:11,14 95:19 <b>york</b> 1:3,18 5:5,20 72:2
	<b>z</b>	
	<b>z</b> 20:25 <b>zero</b> 14:1,2	
	<b>x</b>	
	<b>x</b> 1:6,14 138:1,11	
	<b>y</b>	
	<b>y</b> 60:25 <b>yeah</b> 7:12 17:6,23 18:6 20:13 23:15 26:8 32:2,7 54:8 65:15 81:1 91:14 93:3 97:22 102:16 109:20	